

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions

of the United States Court of Customs and  
Patent Appeals and the United States  
Customs Court

Vol. 13

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JULY 11, 1979

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No. 28

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THE DEPARTMENT OF THE TREASURY

U.S. Customs Service

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# U.S. Customs Service

## *Treasury Decisions*

(T.D. 79-173)

### Cotton and Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of cotton and manmade fiber textile products manufactured or produced in Mexico

There is published below a directive of March 29, 1979, received by the Commissioner of Customs from the chairman, Committee for the Implementation of Textile Agreements, concerning restriction on entry of cotton and manmade fiber textile products in certain categories manufactured or produced in Mexico.

This directive was published in the Federal Register on April 4, 1979 (44 F.R. 20240), by the committee.

(QUO-2-1)

Dated: June 18, 1979.

WILLIAM D. SLYNE  
(For Ben L. Irvin, Acting  
Director, Duty Assessment Division).

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U.S. DEPARTMENT OF COMMERCE,  
THE ASSISTANT SECRETARY FOR INDUSTRY AND TRADE,  
*Washington, D.C., March 29, 1979.*

### Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,  
*Department of the Treasury,*  
*Washington, D.C.*

DEAR MR. COMMISSIONER: Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 14, 1977; pursuant to the Bi-

lateral Cotton, Wool, and Man-Made Fiber Textile Agreement of February 26, 1979, between the Governments of the United States and the United Mexican States; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on April 2, 1979, and for the 12-month period which began on January 1, 1979, and extends through December 31, 1979, entry into the United States for consumption and withdrawal from warehouse for consumption, of cotton and manmade fiber textile products, exported from Mexico in the following categories, in excess of the indicated 12-month levels of restraint:

<i>Category</i>	<i>12-month level of restraint</i> <sup>1</sup>	
338/339	368,056	dozen
347/348	526,626	dozen of which not more than 315,976 dozen shall be in category 347 and not more than 315,976 dozen shall be in category 348
604 (only TSUSA No. 310.5049)	853,659	pounds
633	46,961	dozen
634/635	267,710	dozen of which not more than 160,626 dozen shall be in category 634 and not more than 160,626 dozen shall be in category 635
638/639	12,873,433	square yards equivalent of which not more than 429,114 dozen shall be in category 638 and not more than 514,937 dozen shall be in category 639
641	265,222	dozen
647/648	1,309,185	dozen of which not more than 785,511 dozen shall be in category 647 and not more than 785,511 dozen shall be in category 648
649	2,277,083	dozen

In carrying out this directive entries of cotton and manmade fiber textile products in the foregoing categories, produced or manufactured in Mexico and exported to the United States prior to January 1, 1979,

<sup>1</sup> The levels of restraint have not been adjusted to reflect any imports after Dec. 31, 1978.



and entered on and after the effective date of this directive, shall not be charged against the levels of restraint established in this directive.

Cotton and manmade fiber textile products in the foregoing categories that have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1)(A) prior to the effective date of this directive shall not be denied entry under this directive.

The levels of restraint set forth above are subject to adjustment in the future according to the provisions of the bilateral agreement of February 26, 1979, between the Governments of the United States and the United Mexican States, which provide, in part, that: (1) Specific limits or specific sublimits may be exceeded by not more than 7 percent in any agreement period; (2) these same limits may be increased for carryover and carry-forward up to 11 percent of the applicable category limit, or sublimit; and (3) administrative arrangements or adjustments may be made to resolve minor problems arising in the implementation of the agreement. Any appropriate adjustments under the provisions of the bilateral agreement, referred to above, will be made to you by letter.

A detailed description of the textile categories in terms of TSUSA numbers and factors for converting equivalent square yards was published in the Federal Register on January 4, 1978 (43 F.R. 884), as amended on January 25, 1978 (43 F.R. 3421), March 3, 1978 (43 F.R. 8828), June 22, 1978 (43 F.R. 26773), September 5, 1978 (43 F.R. 39408), and January 2, 1979 (44 F.R. 94).

In carrying out the above directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

The actions taken with respect to the Government of the United Mexican States and with respect to imports of cotton and manmade fiber textile products from Mexico have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

ROBERT E. SHEPHERD,

*Chairman, Committee for the Implementation of Textile Agreements, and Deputy Assistant Secretary for Domestic Business Development.*

(T.D. 79-174)

## Foreign Currencies—Variances From Quarterly Rate

Rates of exchange based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in T.D. 79-113 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

## Denmark krone:

June 4-5, 1979	-----	\$0. 181159
June 6, 1979	-----	. 180865
June 7, 1979	-----	. 181422
June 8, 1979	-----	. 181159

(LIQ-3-O:D:E)

Date: June 19, 1979.

BEN L. IRVIN,  
Acting Director,  
Duty Assessment Division.

(T.D. 79-175)

## Foreign Currencies—Daily Rates for Countries not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, People's Republic of China yuan, Philippines peso, Singapore dollar, Thailand baht (tical)

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

## Brazil cruziero:

June 4-8, 1979----- \$0. 0389

## People's Republic of China yuan:

June 4-8, 1979----- \$0. 626370

## Hong Kong dollar:

June 4, 1979----- \$0. 195886

June 5, 1979----- . 194913

June 6, 1979----- . 194458

June 7, 1979----- . 194647

June 8, 1979----- . 195351

## Iran rial:

June 4-8, 1979----- \$0. 013150

## Philippines peso:

June 4-8, 1979----- \$0. 1365

## Singapore dollar:

June 4, 1979----- \$0. 452489

June 5, 1979----- . 453515

June 6-7, 1979----- . 453309

June 8, 1979----- . 453515

## Thailand baht (tical):

June 4-7, 1979----- \$0. 0490

June 8, 1979----- . 048850

(LIQ-3-O:D:E)

Date: June 19, 1979.

BEN L. IRVIN,  
*Acting Director,*  
*Duty Assessment Division*

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(T.D. 79-176)

## Licensed Public Gager

Approval of licensed public gager performing gaging under standards and procedures required by Customs

Notice is hereby given pursuant to the provisions of section 151.43(b) of the Customs Regulations that the application of Caribbean Petroleum Inspectors, Inc., Calle 1-E-9, Villa Del Carmen, Ponce, Puerto Rico, to gage imported petroleum and petroleum

products in the Customs district of San Juan, Puerto Rico, and Charlotte Amalie, St. Thomas, Virgin Islands, is approved.

Dated: June 18, 1979.

DONALD W. LEWIS,  
*Acting Assistant Commissioner,  
Regulations and Rulings.*

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(T.D. 79-177)

### Foreign Currencies—Daily Rates for Countries Not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, People's Republic of China yuan, Philippines peso, Singapore dollar, Thailand baht (tical)

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

**Brazil cruziero:**

June 11-15, 1979..... \$0. 0389

**People's Republic of China yuan:**

June 11-15, 1979..... \$0. 628891

**Hong Kong dollar:**

June 11, 1979..... \$0. 195084

June 12, 1979..... . 194970

June 13, 1979..... . 195008

June 14, 1979..... . 194970

June 15, 1979..... . 194951

**Iran rial:**

June 11-15, 1979..... \$0. 013150

**Philippines peso:**

June 11-15, 1979..... \$0. 1365

**Singapore dollar:**

June 11, 1979..... \$0. 453721

June 12, 1979..... . 453515

June 13, 1979..... . 454133

June 14, 1979	-----	. 454030
June 15, 1979	-----	. 454959

Thailand baht (tical):

June 11-15, 1979	-----	\$0. 048850
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(LIQ-3-0:D:E)

Date: June 25, 1979.

BEN L. IRVIN,  
*Acting Director,*  
*Duty Assessment Division.*

(T.D. 79-178)

## Foreign Currencies—Variances From Quarterly Rate

Rates of exchange based upon rates certified to the Secretary of the Treasury by  
the Federal Reserve Bank of New York

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in T.D. 79-113 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Denmark krone:

June 11, 1979	-----	\$0. 181357
June 12, 1979	-----	. 181242
June 13, 1979	-----	. 181455
June 14, 1979	-----	. 181703

(LIQ-3-0:D:E)

Date: June 25, 1979.

BEN L. IRVIN,  
*Acting Director,*  
*Duty Assessment Division.*

## ERRATA

In CUSTOMS BULLETIN, vol. 13, No. 19, dated May 9, 1979, in T.D. 79-125-Q, on page 8, correct typographical error in third line to read:

Merchandise: Imported cash dispensers model 1110, magnetic card

In CUSTOMS BULLETIN, vol. 13, No. 20, dated May 16, 1979, in T.D. 79-129-R, on page 7, correct typographical error in first line to read:

(R) Company: Power Curbers, Inc.

In CUSTOMS BULLETIN, vol. 13, No. 23, dated June 6, 1979, in T.D. 79-155-Q, on page 5, correct date in line 8 to read:

January 30, 1979.

In CUSTOMS BULLETIN, vol. 13, No. 25, dated June 20, 1979, on front cover, line 10 should read:

T.D. 79-158 through 79-163.

In CUSTOMS BULLETIN, vol. 13, No. 26, dated June 27, 1979, on front cover, line 10 should read:

T.D. 79-158 through 79-171.

## Customs Service Decisions

The following are decisions made by the U.S. Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

Dated: June 22, 1979.

DONALD W. LEWIS,  
*Acting Assistant Commissioner,  
Regulations and Rulings.*

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(C.S.D. 79-264)

Vessel Repair: Applicability of the Vessel Repair Statute to a Foreign-Built, U.S.-Documented Barge Which Has Never Departed From a U.S. Port

[Telegram]

Date: November 9, 1978  
File: VES-13-18-R:CD:C  
103690 JL

Re Urtel, October 12, 1978, requesting advisory opinion whether duties under 19 U.S.C. 1466 would be payable on repairs to lay barge No. 28 effected more than 6 months subsequent to construction of vessel in Japan in 1973. Assuming barge qualifies as special purpose vessel under 19 U.S.C. 1466(c), 6-month period began to run on date construction concluded on barge or date Coast Guard documentation granted, whichever is later.

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(C.S.D. 79-265)

Vessel Repair: Applicability of the Vessel Repair Statute to a Foreign-Built Barge Operating Foreign Under a Certificate of American Ownership

Date: December 7, 1978  
File: VES-13-18-R:CD:C  
103685 JL

This ruling concerns a request for advice on the applicability of the vessel repair statute, 19 U.S.C. 1465, to a foreign-built barge which,

for a time, operated within foreign waters and on the high seas under a certificate of American ownership prior to its receipt of a U.S. certificate of registry and its subsequent arrival in an American port.

*Issues.*—1. Is a certificate of American ownership "documentation" within the purview of 19 U.S.C. 1466?

2. When a vessel is built in a foreign country and operated foreign under a certificate of American ownership before being documented by the U.S. Coast Guard (while still foreign), repairs effected during which period are required to be declared upon the vessel's first arrival in a U.S. port?

3. Is 19 U.S.C. 1466(c) applicable to a barge that has never been in U.S. territorial waters? If so, does the vessel's operation under a certificate of American ownership affect its application?

*Facts.*—The vessel at issue, a non-self-propelled barge (BAR 271) was built in the Netherlands in 1967 for an American operator. The vessel was operated on a "certificate of American ownership" until 1977 when it was documented by the U.S. Coast Guard and issued a certificate of registry. This ruling will presume that foreign repairs were made while the barge was operated under both the certificate and the register.

*Law and analysis.*—Headquarters telegram dated November 9, 1978,\* file 103690, held that a barge constructed for an American company in Japan in 1973, subsequently documented by the U.S. Coast Guard, and which had never been entered into the United States would be subject to the exceptions granted in 19 U.S.C. 1466(c), provided the barge otherwise qualifies as a special purpose vessel. It was also held that the foreign voyage of the vessel began on the date construction on the vessel was concluded, or the date that the Coast Guard documentation was granted, whichever is later.

T.D. 75-146(1), reissued as Legal Determination 3730-01 in the CIS, held that because the vessel repair statute, 19 U.S.C. 1466, applies to the first arrival in a U.S. port (after foreign repairs or purchases of equipment) of a vessel documented under U.S. law, no liability for duty on foreign repairs arises if the vessel relinquishes its U.S. documentation after the repairs are made and is registered under a foreign flag prior to its arrival in the United States.

CIE 854/60 dated June 17, 1960, held, in part, that drilling rigs, tenders, and other craft of American manufacture operating in Venezuelan waters and upon which repairs were effected while the vessels were under foreign registry are not liable to the provisions of 19 U.S.C. 1466.

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\*Published in the Customs Bulletin (this issue) as C.S.D. 79-264.



19 U.S.C. 1466(a) holds in relevant part as follows:

The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 percentum on the cost thereof in such foreign country; \* \* \*.

19 U.S.C. 1466(c) states as follows:

In the case of any vessel designed and used primarily for purposes other than transporting passengers or property in the foreign or coastal trade which arrives in a port of the United States 2 years or more after its last departure from a port of the United States, the duties imposed by this section shall apply only with respect to (1) fish nets and netting, and (2) other equipments, and parts thereof, and repair parts and materials purchased, or repairs made, during the first 6 months after the last departure of such vessel from a port of the United States.

The Vessel Documentation Branch, U.S. Coast Guard, advises that a certificate of American ownership is a document issued by U.S. Consulates for the purpose of proving that a vessel is owned by an American citizen or corporation, and has no bearing on, or relation to, its documentation as a vessel of the United States.

It is clear from the precedents outlined above that the vessel repair statute by its terms is intended to apply only to vessels which are American-registered when they arrive at a U.S. port, and in the narrow factual situation presented herein, only to repairs and equipment purchases accomplished during the period of time relating back from the vessel's arrival to when its American registry was obtained. In the instant case, liability for declaration of foreign repairs will begin on October 12, 1977, the date on which the barge was officially documented by the U.S. Coast Guard.

Regarding the application of 19 U.S.C. 1466(c) and following our holding of November 9, 1978, as cited above, the barge's "last departure of such vessel from a port of the United States" will be deemed to have begun on the date of its documentation by the U.S. Coast Guard, that is, October 12, 1977. The relief afforded through the vehicle of subsection (c) of the statute would not be available to the barge unless its arrival in the United States will be accomplished more than 2 years after that date, however. If that is (or will be) the case, then only those repairs or equipment purchases effected during the first 6 months of the vessel's voyage, again dating from October 12, 1977, will be dutiable. These views are, of course, offered with the

assumption that the vessel does indeed qualify as a special-purpose vessel, which issue we do not reach in this ruling.

*Holding.*—1. A certificate of American ownership is not documentation bringing a vessel within the purview of 19 U.S.C. 1466.

2. Repairs effected and equipments purchased for a vessel after it receives a certificate of registry (in this case, October 12, 1977) are subject to declaration and entry under the vessel repair statute upon the vessel's first arrival in the United States.

3. The relief provided by 19 U.S.C. 1466(c) is not vitiated by the fact that a vessel operated under a certificate of American ownership before obtaining American documentation and had never been in U.S. waters.

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(C.S.D. 79-266)

Reliquidation: Request to Reliquidate an Entry Under 19 U.S.C. 1520(c)(1); Correctable Mistake of Fact

Date: December 12, 1978  
File: ENT-1-01-R:E:E  
305387 K

REGIONAL COMMISSIONER OF CUSTOMS,  
New York, N.Y.

Re decision on application for further review of Protest No. 1001-7-00-1110

DEAR SIR: This decision concerns a protest against your refusal to reliquidate various entries under the provisions of section 520(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)).

The entries were made between January 1973, and October 1975. The importer's broker assumed, on the basis of information supplied, that the merchandise was properly dutiable as rayon velvet upholstery cloth, and entered it accordingly. In fact, the merchandise contained cutting lines dedicating it for use as valances and curtain tiebacks, a fact which the importer failed to communicate to the broker because he did not realize that the presence of cutting lines would affect the classification of the merchandise, and permit entry at a lower rate of duty.

When the broker realized, in July 1975, that the fabric contained cutting lines, he obtained a headquarters ruling (dated February 13, 1976) that the merchandise was dutiable at the lower rate. He also filed requests for reliquidation under section 520(c)(1). Generally, claims made within 1 year of the date of entry were allowed, while claims made more than 1 year from the date of entry were denied as untimely. The broker filed protests against many of those denials.

You denied those protests in 1976. No summonses were filed in the Customs Court.

On August 4, 1976, the importer's attorney submitted a request for internal advice on the question of the timeliness of the broker's claims under section 520(c)(1). He alleged that the broker orally brought the error to the attention of the import specialists concerned about July 7, 1975. He also argued that if an error made at the time of entry is further compounded at the time of liquidation, the 1-year period for filing a request for reliquidation under section 520(c)(1) runs from the date of liquidation.

On November 2, 1976, he asked that you consider his August 4 letter as a request to reliquidate the entries under section 520(c)(1).

On February 7, 1977, you denied the request of August 4. Your denial in pertinent part disagreed with the attorney's interpretation of the time limits of section 520(c)(1), and stated that the appropriate import specialists had no record or recollection that the error was brought to their attention in July 1975. This protest is directed against your February 7 decision.

The attorney recognizes that your prior denials of the broker's claims are final and not now reviewable, but he contends that there is no legal impediment to the subsequent filing of another 520(c)(1) claim, with additional and new arguments, by another representative of the importer. The basis for his belief is the language in section 520(c)(1) which provides for relief "notwithstanding a valid protest was not filed."

In view of the statutory requirement that the error must be brought to the attention of Customs within stated time limits, the quoted language obviously does not authorize the potential filing of endless claims, each protestable and reviewable on the merits.

Those time limits have recently been amended by section 210 of Public Law 95-410, to provide that errors correctable under section 520(c)(1) must be brought to the attention of Customs within 1 year of the date of liquidation. We interpret that amendment as applying to all entries the liquidation of which has not become final, and have therefore considered the attorney's letter of August 4 and his application for further review in the context of the amended section 520(c)(1).

The letter of August 4 was submitted more than 1 year after the date of liquidation of all the entries except entry No. N110109, dated December 10, 1974, and liquidated on October 17, 1975. Therefore, we will only consider the 520(c)(1) claim with regard to entry No. N110109.

We cannot accept the broker's unsubstantiated allegation that he orally advised the appropriate Customs officers of the error in early

July 1975. His written request for reliquidation, submitted more than 1 year from the date of entry, was properly denied as untimely on August 13, 1976, under the law in effect at that time. No protest was filed against that denial.

In view of the amended time limits of section 520(c)(1), the attorney's detailed arguments on the proper basis for computing the time limits of section 520(c)(1) are moot.

Although his request to reliquidate entry No. N110109 was timely, we do not agree with his contention that the error was correctable under section 520(c)(1). Nor do we interpret your letter of February 7, 1977, as conceding that there was a correctable mistake of fact. The importer's ignorance of the fact that the presence of cutting lines would affect the classification of the merchandise was an error of law. The presence of cutting lines was apparent, judging by the headquarters ruling to which the attorney referred in his letter of August 4. That ruling stated that "The fabrics as constructed have two definite designs and the cutting lines between them are clearly defined." We conclude that any erroneous classification under these circumstances was an error in the construction of a law, which is specifically excluded from relief under section 520(c)(1).

Under the circumstances, you are directed to deny the protest in full.

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(C.S.D. 79-267)

**Value: Whether Certain Switches Used on Motor Vehicles Are on the Final List**

Date: December 18, 1978  
File: R:CV:V BS  
055346

To: Director, Classification and Value Division Laredo, Tex. 78040.  
From: Director, Classification and Value Division.  
Subject: IA No. 114/78.

This ruling concerns the proper basis of appraisalment for certain switches used in automobiles.

*Issue.*—The issue is whether trunk release and window defogger switches used in automobiles are on the final list (T.D. 54521), under "automotive parts, finished."

*Facts.*—The subject switches are manufactured in such a manner so as to be connected to a 12-volt power source in an automobile. The configuration of the prongs is adapted for such a connection as distinguished from other switches where prongs generally are connected to the more conventional 110-volt power source. The switches are

used in automobiles, trucks, busses, and perhaps certain other motor vehicles.

*Law and analysis.*—Whether a particular article is on the final list depends on whether the Secretary of the Treasury had intended that such article be included. The “dedication” test has been used by the courts to help determine the Secretary’s intent in cases where such intent with respect to a particular item is unclear. Thus, in *Airco Speer Division, Air Reduction Company, Inc. v. United States*, 64 Cust. Ct. 737 (1970), R.D. 11710, the court stated that the proper test of whether an article is a part (in that case, of television apparatus) and on the final list is whether it is dedicated to a particular use and not whether it is chiefly used in such article.

In the instant case, the importer’s position is that the subject switches are not dedicated to use as automobile parts since they are used in trucks and buses in addition to automobiles, and also have other unspecified applications. Further, the switches are classified under item 685.90, TSUS, as electrical switches (and not under any provision involving motor vehicles). This also reflects a lack of dedication as automobile parts.

In *National Carloading Corporation v. United States*, 53 CCPA 57 (1966), C.A.D. 877, the Court of Customs and Patent Appeals held that sparkplugs were not “automobile parts, finished,” for final list purposes. The court based its decision primarily upon classification principles and decisions, and that a “reasonable person” interested in the importation of sparkplugs would consider such items to be parts of internal combustion engines, rather than automobile parts. Similar reliance was placed upon classification decisions in the cases of *U.S. Divers Co. v. United States*, 6464 Cust. Ct. 721 (1970), R.D. 11707, and *Airco Speer*, *supra*. In *Divers*, the court held that swimming masks were not goggles for final list purposes. The court in *Divers* stated that it did not believe the common meaning of the phrase “goggles” (on the final list) ever embodied masks.

Although courts have frequently relied upon classification principles and decisions in determining whether a particular article is on the final list, as in the cited cases, it is Customs position that the language of a given listing (on the final list) does not necessarily bear a relationship to the classification of an article, although the same language may have been employed both on the list and in the Tariff Act. (See, e.g., C.I.E. 791/59, dated May 26, 1959, and C.I.E. 2-38/63, dated September 27, 1963; also *Estee Candy Co., Inc. v. United States*, 65 Cust. Ct. 702 (1970), R.D. 11719. Furthermore, although the courts in *National Carloading*, *Divers*, and *Airco Speer* followed classification principles, the primary thread running through these decisions was whether a “reasonable person” would consider the final list description

to include the subject article; or, whether the "common meaning" of the subject article was the same as the article described on the final list.

Due to the configuration of the prongs, the switches in question are capable of being used only in connection with a 12-volt power source, which is itself used primarily in motor vehicles. The switches are not capable of being utilized in general applications, using the conventional 110 volt power source. In addition, the fact that the switches may also be used on trucks and busses does not preclude these articles from consideration as "automobile parts, finished". Thus, CSA List Letter No. 30 (C.I.E. 886/59) provided:

There are, of course, certain parts which may be used interchangeably on automobiles, trucks, or busses. In view of the fact that there are considerably more automobiles than trucks or busses such parts should be considered as included under the final list description for "automobile parts, finished." However, any truck or bus part which is solely adaptable for use on a truck or bus, is not to be considered as included under this description on the final list.

*Holding.*—Trunk release and window defogger switches used in automobiles are on the final list under the listing "automobile parts, finished."

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(C.S.D. 79-268)

Classification: Determination of Material in Chief Value in Girl's Coat

Date: December 18, 1978

File: CLA-2:R:CV:MC

055247 PR

AREA DIRECTOR OF CUSTOMS,  
*New York Seaport,*  
*New York, N.Y.*

DEAR SIR: This ruling concerns a Request for Internal Advice, No. 76/78, concerning the tariff classification of certain girls' coats manufactured by (manufacturer) in Korea and imported by (importer) at the Port of New York and at other ports.

*Issue.*—The importer believes that the merchandise is classifiable under the provision for wearing apparel of rubber or plastics, in item 772.30, Tariff Schedules of the United States (TSUS). The basis for this classification is that, according to the importer, the outer surface of each of the coats is coated or filled with a nontransparent rubber or plastics material and, therefore, headnote 5, schedule 3, TSUS, is applicable. In the alternative, the importer believes that even if the

merchandise is not considered to fall within the purview of headnote 5, it should be classifiable in item 772.30 because it is in chief value of the rubber or plastics material. Customs officers have required that the entry covering the subject merchandise be filed under the provision for other women's or girls' wearing apparel, not ornamented, of manmade fibers, not knit, in item 382.81, TSUS, in the belief that headnote 5 was not applicable and that the subject merchandise was not in chief value of rubber or plastics for tariff purposes.

*Facts.*—No sample was received by this office. However, we believe that in this instance the report from the area director, New York Seaport, contains sufficient information for us to rule in the absence of such a sample.

According to the importer, the girls' polyurethane suede-like coats are constructed with an outer shell and a lining. The outer shell is stated to consist of six layers. Those layers are, starting from the innermost layer and working out, (1) a knitted rayon fabric, (2) a layer of polyvinyl chloride, (3) a layer of polyvinyl chloride binder, (4) a layer of cotton powder, (5) a layer of polyurethane print, and (6) a layer of polyurethane. According to a letter from the (company name) submitted by the importer, the outer shell fabric of the garments is broken down by weight in the following manner; the rayon backing constitutes 15.3 percent; the two polyvinyl chloride layers constitute 69.8 percent; the cotton powder constitutes 13.3 percent; and the two polyurethane layers constitute 1.6 percent. Also submitted by the importer is a letter from the U.S. Testing Co. which states that a weak spectrograph made from the "pile side" of the fabric is "indicative of polyurethane (and numerous other chemicals)."

A Customs laboratory subjected a sample garment to analysis. That analysis revealed that the outer shell fabric of the garment consists of four layers of material: (1) An outer surface of cotton flock, (2) a layer of adhesive, (3) a layer of foam plastic, and (4) a knitted rayon fabric. The laboratory specifically examined the exterior portion of the fabric and determined that it (the cotton flock) was not coated, filled, or laminated with rubber or plastics material. The Customs laboratory also subjected the outer surface of the garment to a scanning electron microscope with a 200x magnification. Photographs of this examination are contained in the file and clearly show a layer of what appears to be cotton fibers. The pictures do not indicate the presence of any plastics material on the cotton fibers. Further tests performed by the Customs laboratory reveal that the spectrograph results were not due to the presence of polyurethane, but were attributable to another substance, not regarded as a plastics, which is commonly used as a softener in this type of fabric.



*Law and analysis.*—The pertinent portions of the tariff schedules are as follows:

SCHEDULE 3.—TEXTILE FIBERS AND TEXTILE PRODUCTS

Schedule 3 headnotes

\* \* \* \* \*

4. For the purposes of the tariff schedules—

\* \* \* \* \*

(b) In determining the component fibers of chief value in coated or filled, or laminated, fabrics and articles wholly or in part thereof, the coating or filling, or the non-textile laminating substances, shall be disregarded in the absence of context to the contrary.

5. For the purposes of parts 5, 6, and 7 of this schedule and parts 1 (except subpart A), 4, and 12 of schedule 7, in determining the classification of any article which is wholly or in part of a fabric coated or filled, or laminated, with nontransparent rubber or plastics (which fabric is provided for in part 4C of this schedule), the fabric shall be regarded not as a textile material but as being wholly of rubber or plastics to the extent that (as used in the article) the nontransparent rubber or plastics forms either the outer surface of such article or the only exposed surface of such fabric.

\* \* \* \* \*

Subpart 4C headnotes:

\* \* \* \* \*

2. For the purposes of the tariff schedules—

(a) the term "coated or filled", as used with reference to textile fabrics and other textile articles, means that any such fabric or other article has been coated or filled (whether or not impregnated) with gums, starches, pastes, clays, plastics materials, rubber, flock, or other substances,



so as to visibly and significantly affect the surface or surfaces thereof otherwise than by change in color, whether or not the color has been changed thereby;

\* \* \* \* \*

Other women's, girls', or infants' wearing apparel, not ornamented

Of manmade fibers

*	*	*	*	*	*	*
382.81			Not knit-----		25¢ per lb. +	
					27.5% ad	
					val.	

\* \* \* \* \*

SCHEDULE 7.—SPECIFIED PRODUCTS; MISCELLANEOUS AND NON-ENUMERATED PRODUCTS

*	*	*	*	*	*	*
772.30			Wearing apparel (including rainwear) not specially provided for, of rubber or plastics-----		12.5% ad val.	

Based on the above facts, the examination of the merchandise by the Customs laboratory appears to be more thorough and accurate than the information submitted by the importer. Accordingly, this ruling will be predicated on the findings and determinations of the Customs laboratory. On that basis, headnote 5, schedule 3 is not applicable to the instant merchandise because the outer surface of the garment which was examined, or the only exposed surface of the fabric forming the outer shell of that garment was covered with cotton fibers and not with a nontransparent rubber or plastics material.

The applicability of item 772.30 to the instant merchandise in the absence of that merchandise falling under the purview of headnote 5 is asserted on the basis that the only reason headnote 5 would be considered not applicable to that merchandise is if the garments were not considered coated or filled for tariff purposes. In that event, importer believes that headnote 4(b) would not be applicable to the merchandise and, therefore, the merchandise (which is stated to be in chief value of plastics) would not be classifiable in schedule 3.

In accordance with headnote 2(a), subpart 4C, schedule 3, the knit rayon fabric in the outer shell has been coated or filled with two layers of plastics material and a layer of cotton flock (according to the Customs laboratory). There has been no finding that the knit rayon fabric is not coated or filled. Rather, the finding by the Customs laboratory upon which this ruling is based is that the outer surface of the instant merchandise is formed by cotton fibers. In accordance with

headnote 4(b), the value of the cotton flock layer, which is a coating as defined in headnote 2(a), and the values of the two layers of plastics materials, which are also considered coatings or fillings for tariff purposes, are disregarded in determining the component material of chief value.

*Holding.*—Contrary to the position of the importer, headnote 5 is not applicable to the subject merchandise but headnote 4(b) is applicable. Accordingly, that merchandise, if not ornamented for tariff purposes, is properly classifiable in item 382.81, TSUS.

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(C.S.D. 79-269)

Classification: Whether Certain Double Stitching on a Woman's Raincoat Constitutes Ornamentation

Date: December 19, 1978  
File: CLA-2:R:CV:MC  
054827 EA

To: Area Director of Customs, New York, N.Y. 10048.

From: Director, Classification and Value Division.

Subject: Request for Internal Advice No. 10-78.

This is in response to your memorandum of January 26, 1978, requesting internal advice with regard to the classification of a woman's woven cotton raincoat having a pointed collar, five button front closure, epaulets, adjustable sleeve tabs, belt, two slash pockets, front and back yokes, and a box pleat extending the length of the back section with a double row of stitching along each fold. The issue raised by this request is whether the second row of stitching along the folds of the back pleat constitutes ornamentation.

The initiator of the request contends that the second row of stitching does not constitute ornamentation for reasons which may be summarized as follows:

- (1) Both the Customs Court and the Customs Service have held that such stitching does not constitute ornamentation.
- (2) The second row of stitching is often placed on the garment by a double needle sewing machine at the same time as the initial row, and the two rows of stitching are essentially one row of double stitching.
- (3) A second row of stitching is necessary to preserve, and reinforce the folds of the pleat, which is an area of stress on the garment.
- (4) The second row is barely visible and, accordingly, can neither adorn, embellish, or decorate the garment, nor influence a person's decision to buy such a garment, and would not otherwise constitute ornamentation in any accepted trade sense.

The Customs Service has held that double stitching along the seams and hems of certain articles of wearing apparel does not constitute ornamentation. However, this practice has not been extended to all rows of double stitching, and will not be so extended. For example, the question of whether a double row of stitching along the fold of a pleat on the sports jacket constituted ornamentation was affirmatively answered in a headquarter's reply to Internal Advice Request 110/76 (047371, January 27, 1977).

The Customs Court has, on a number of occasions, addressed the issue of "stitching" as constituting ornamentation. However, we are aware of no case in which the court has spoken specifically on the issue of a double row of stitching along the fold of a pleat, and no case which would otherwise compel the determination urged by the initiator. The cases relied on by the initiator, specifically, *Protest of A. Beller & Co.*, 42 T.D. 18, T.D. 39203 (1922) and *Kayser & Co. Inc., v. Penny; United States Impleaded*, 49 T.D. 287, T.D. 41368 (1926), were decided prior to the enactment of the Tariff Schedules of the United States (TSUS), and focused primarily on the question of whether certain stitching constituted "embroidery." The term "ornamentation," as defined in the TSUS, includes a much wider variety of ornamental stitching than that which would constitute embroidery. In addition, in both cases, the court determined that the stitching was primarily functional.

As neither court precedent nor administrative practice is determinative of the instant inquiry, the question of whether the second row of stitching constitutes ornamentation may be independently resolved. Headnote 3(a)(i), schedule 3, TSUS, provides in pertinent part, that the term "ornamented" means articles of textile material which are ornamented with yarns, Accordingly, nonfunctional yarn, or yarn, the functional purpose of which is merely incidental to its principal function of adorning, embellishing, decorating, or enhancing the appearance of the textile article to which affixed, constitutes ornamentation for tariff purposes.

No evidence has been presented that the double rows of stitching down the center seam and along the pleat edges were applied by the same machine or at the same stage of the assembly process as the stitching along other seams. In any event, it is of no consequence that the double stitching appears on the garment simply because it was convenient for the manufacturer to retain the use of a double needle sewing machine to secure the fold, if the stitching does in fact ornament the garment and is primarily nonfunctional. Whether or not particular stitching constitutes ornamentation depends on its resulting effect upon the merchandise rather than the intention of the manu-

facturer. *Colonial Corp. of America v. United States*, 62 Cust. Ct. 502, C.D. 3815 (1969).

While one row of stitching along the pleat functions to prevent over-expansion and to preserve the crease, a second row is not necessary to this function. As there is minimal stress or pull on the folded edge of the pleat during its use, reinforcement by a second row of stitching is not required.

The second row of stitching is visible on the garment and has the effect of coordinating the pleat stitching to other double rows of stitching along the various seams of the garment. On reviewing the garment as a whole, it is obvious that the two rows of stitching along the pleat edge impart a more eye appealing and pleasing appearance than a single row of stitching would along that same pleat edge. Therefore, the second row of stitching does, in fact, enhance, decorate, and embellish the garment.

This reply to Internal Advice Request No. 10-78 is not intended to alter any prior practices regarding the tariff status of double rows of stitching appearing on textile articles, and is intended only to apply to double rows of stitching along the folds of box pleats.

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(C.S.D. 79-270)

Classification: Material Used in the Manufacture of Tires

Date: December 19, 1978

File: CLA-2-R:CV:MC

047199 PR

DISTRICT DIRECTOR OF CUSTOMS,  
CHARLESTON, S.C.

DEAR SIR: This is in response to your Request for Internal Advice, No. 97/76, dated June 7, 1976, concerning the tariff classification of certain tire material.

*Issue.*—The issue presented by your request is whether the instant merchandise is classifiable under the provision for textile fabrics for use in pneumatic tires, in item 357.80, Tariff Schedules of the United States (TSUS), with duty at the rate of 12.5 percent ad valorem, or under the provision, as it then existed, for articles not specially provided for, of manmade fibers, other, in item 389.60, TSUS, with duty at the rate of 25 cents per pound plus 15 percent ad valorem.

*Facts.*—The merchandise in question consists of plied rayon warp cords, a latex-based glue, and rubber, and is in chief value of the rayon cords. The cords are pasted under uniform tension with a latex-based glue bath and then dried and cured in a heating and drying

tunnel. After this, while still under uniform tension to maintain parallel alinement and uniform spacing, the cords are calendered by means of steam-heated rollers which press a skim or thin layer of rubber on each side of the cords. The merchandise is then wound on spools, each layer separated by plastic strips, and aged prior to importation.

The importer has submitted numerous affidavits from individuals in the tiremaking industry, both in this country and abroad, attesting to the fact that the instant merchandise is known in the tire industry as "tire fabric" and as "textile fabric" and that it has been known by those designations since before the inception of the tariff schedules. Our national import specialist has verified this information. Further, our own independent inquiries, while confirming the above, have determined that in the industry the merchandise is actually known as a "creel calendered rayon."

*Law and analysis.*—In order to determine the proper classification of the subject merchandise, it must first be determined whether that merchandise is a "textile fabric" for purposes of item 357.80.

The American Society of Testing Materials (ASTM) has included, at least since 1954, in its standard D 123, "Standard Definitions of Terms Relating to Textile Materials," the following definition:

Fabric, laid, *n.*, fabric made without filling yarn, the parallel warp yarns being held together by means of rubber latex or other binding material.

Similar definitions of laid fabrics are cited in "The Modern Textile and Apparel Dictionary" (1954 and 1973) and in "Fairchild's Dictionary of Textiles" (1959 and 1967). However, all the definitions that we have been able to locate of the word "fabric" by itself have referred to a weaving, knitting, or some other form of interlacing of yarns, fibers, or filaments. Further, "Fairchild's Dictionary of Textiles" (1967) contains the following statement concerning "tire fabric."

Not a true fabric today, but originally a square woven fabric was employed in making the pneumatic automobile tire. The modern tire fabric is not woven or knitted, but consists of cabled yarns with hawser twists formerly mostly cotton, now usually of high tenacity viscose rayon or nylon. These cords are arranged in parallel order and rubberized. When these tire cords were first made they were assembled as a warp on a loom and held in place until rubberized by an occasional single filling yarn, and it is probably due to this that the term "fabric" has remained in use (at p. 592).

Paragraphs 905 and 904(e), Tariff Acts of 1922 and 1930, respectively, were the predecessor statutes to item 357.80, TSUS. They provided for "Tire fabric and fabric for use in pneumatic tires, including cord fabric." The predecessors to those two statutes, paragraph 262,

Tariff Act of 1913, and paragraph 330, Tariff Act of 1909, specifically provided for "Tire Fabrics." When the Tariff Schedules were enacted in 1963, the term "tire fabrics" and the phrase "including cord fabrics" were deleted.

"The Modern Textile and Apparel Dictionary" (1973) defines cord fabric as follows:

CORD FABRIC.—In reality, this is not a fabric but merely an interlacing of about 26 ends of cable yarn with 2 to 6 single-ply yarn filling picks per inch. This loose netlike construction is run into the rubber solution in the manufacture of automobile tires (at p. 125).

"The Dictionary of Tariff Information," 1924, defines tire fabric as consisting mainly of special makes of cotton duck. Cord fabric is stated to be "a peculiar type of tire fabric, consisting of a number of cords held parallel by occasional picks of filling" (at p. 788).

In 1934, the Tariff Commission issued a document which described the instant merchandise in a footnote to its description of tire cord fabric as follows:

Weightless cords "without cross threads or filling" are also used in the manufacture of tires. A continuous sheet of evenly spaced cords is pasted through calender rolls simultaneously with a sheet of soft warmed up rubber to form a rubberized "fabric."

It may be implied from the fact that the above description was contained in a footnote rather than in the description of the merchandise itself and from the fact that quotation marks are used around the word "fabric," that the instant merchandise was not considered a real fabric at that time and that it was probably not within the class of goods known as tire fabric. However, this is conjecture.

"The Summaries of Tariff Information", 1948, merely state that tire fabric is "a term used to include various specialty types of cloths which are used, together with rubber, in the manufacture of pneumatic tires." If the use of the word "cloths" was intentional, it would be meaningful, but there is no real indication why that word was used.

We are aware of no legislative history to the tariff schedules which specifically explains the changes in the wording of the statute. The Tariff Classification Study, CIE 1/64, contains the following comment concerning the use of commercial designation in the tariff schedules which may have some bearing on the matter.

In the proposed revised schedules, emphasis is placed on the development and use of objective standards for making product distinctions, and dependency on commercial designation has been considerably reduced (vol. 1, p. 16).

The rule expressed in *Fynant & Popek v. United States*, 23 CCPA

265, T.D. 48112 (1936), and other cases, is that a change in statutory language imports a change in the meaning of the statute unless the contrary is made plainly apparent. However, in this instance, while there has been a change in the statutory language, we are unable to determine the intended meaning of that change. It may be argued that Congress intended to delete merchandise like the instant merchandise from coverage of item 357.80, TSUS. However, it may also be reasonably argued that the deletion of the term "tire fabrics" from the statutory language was merely to deemphasize the use of commercial designation and not to change the coverage of the statutory language.

It is well established that terms in tariff acts presumably carry the meaning given them in trade and commerce. *Ameliotex, Inc. v. United States*, 65 CCPA —, C.A.D. 1200 (1977). Before the plain understanding of a term can be deviated from, it must be shown by plenary proof to have a different meaning in trade and commerce. *United States v. Wells, Fargo & Company*, 1 Ct. Cust. Appls. 158, T.D. 31211 (1911). Where, however, it is affirmatively established that a tariff term, at the time it was enacted into law, had a meaning in the trade and commerce of the United States which differed from the common meaning and was uniform, definite and general, such commercial meaning will be adopted unless a contrary intention of Congress is clearly manifested. *Florsheim Shoe Company v. United States*, 71 Cust. Ct. 187, C.D. 4495 (1973). Where the interpretation of a statute is uncertain, the benefit of the doubt must be given to the importer. *United States v. Field & Company*, 10 CCPA 183, T.D. 38550 (1920).

In view of the foregoing, the Customs Service believes that while the common meaning of the term "fabrics" would not include the instant merchandise, sufficient evidence has been presented which shows that the subject merchandise is widely known throughout the tire industry as a textile fabric. Therefore, since the commercial designation or trade sense of the term "textile fabric" is different in the tire industry from the common or plain meaning of that phrase, the instant merchandise may be classifiable in item 357.80, TSUS.

It has been suggested that item 357.80, TSUS, is not an actual use provision, even though it appears to read that way. We are aware of *E. Gross & Company v. United States*, 42 Cust. Ct. 388, Abs. 63098 (1950), in which the court held that par. 904(e), Tariff Act of 1930, constitutes a designation of an article in terms of its use and that under "settled principles of law, where an article is provided for according to use, what is contemplated is that it shall be of a class or kind of merchandise chiefly used for the purposes described at or prior to the time the law was enacted."

We feel constrained to point out the *Gross* case involved the pro-



visions of the Tariff Act of 1930 and that general headnote 10(e) (ii), TSUS, which had no counterpart in the Tariff Act of 1930, now provides that a tariff classification controlled by the actual use to which an imported article is put in the United States is satisfied only if, inter alia, proof of such use is furnished within 3 years after the date the article is entered. The Tariff Classification Study, CIE 1/64, volume 1 at pages 14 and 15, contains the following statements:

Provisions based on actual use are indicated by terms such as "for use," "to be used," and similar terms clearly indicating an intention to follow the imported articles into consumption \* \* \*. In addition, a general interpretive rule has been included.

Section 10.132, Customs Regulations (19 CFR 10.132), gives examples of actual use provisions contained in the tariff schedules. One example given is item 131.37, TSUS, which reads "Rice \* \* \* Patena, cleaned, *for use in* the manufacture of canned soups." [Italic added.] The wording is similar to that in item 357.80, TSUS.

Section 10.138, Customs Regulations (19 CFR 10.138), requires that within 3 years from the date of entry, or withdrawal from warehouse, for consumption, the importer is required to submit a certificate by a person having knowledge of the actual use of the imported article. Section 10.139, Customs Regulations (19 CFR 10.139), provides that if the required proof of use is not filed within 3 years from the date of entry, or withdrawal from warehouse, for consumption, the entry shall be liquidated not under the use provision which provides a free rate of duty or a lower rate of duty, but under the tariff provision otherwise applicable to that merchandise.

On the basis of the above, item 357.80, TSUS, is determined to be an actual use provision for which proof of use of the subject merchandise must be presented within 3 years of the date of entry of that merchandise. The requirement for proof of use is by both statute and regulation and the Customs Service has no authority to waive that requirement. Compliance with the regulations requiring the filing of the necessary proof of use is necessary even if the Customs Service had not previously required such proof or even if the Customs Service was rejecting such evidence when offered. See *J. E. Bernard & Company v. United States*, C.D. 4743 (1978).

*Holding.*—If the requisite proof-of-use certificates are filed within the required time, the subject merchandise is classifiable in item 357.80, TSUS. However, if the proof-of-use certificates are not filed within the required time period, then that merchandise should not be classified in item 389.60, TSUS. Since it has been convincingly shown that the instant merchandise is commercially known as a "textile fabric" throughout the tire industry, the proper classification of this merchandise, if it is not classifiable in item 357.80, TSUS, is



under the provision for other textile fabrics, not specially provided for, of manmade fibers, in item 359.50, TSUS, with duty at the rate of 25 cents per pound plus 30 percent ad valorem.

A copy of this ruling should be furnished to the law firm which initiated the request for internal advice.

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(C.S.D. 79-271)

Date: December 22, 1978

File: R:CV:V DA

054793

To: District Director of Customs, Mobile Ala. 36601.

From: Director, Classification and Value Division.

Subject: Dutiability of excess prepaid estimated freight over actual ocean freight charges. Internal Advice No. 118/77.

This is in response to your memorandum of July 13, 1977, file MAN-1-O-M:CV:RBG, concerning the dutiability of the excess prepaid estimated ocean freight over the actual ocean freight charges which have resulted in a net return to the exporter over and above the f.o.b. invoice price.

According to the information submitted to Customs, the exporter issued price lists showing f.o.b. and cost, insurance, and freight prices, the cost, insurance, and freight prices being the same wherever they were delivered in the United States. The importer ordered the merchandise at the f.o.b. price. In order to know his landed cost, the importer required that shipment be made on a freight included basis, C&F. The exporter issued invoices showing the f.o.b. unit values with an additional lump sum charge for estimated ocean freight added to the f.o.b. prices. An investigation revealed that due to an outmoded method of establishing freight charges, the estimated charges were, in some instances, substantially greater than the actual freight charges. The exporter did not return the excess amounts to the importer.

The importer contends that export value should be determined by the invoiced f.o.b. prices less the estimated freight. The district director contends that since the excess freight charges were not returned to the importer, it represents an additional profit to the exporter. The export value should be appraised at C & F values, less the least amount of actual ocean freight, net, packed. Since there are records of shipments by the exporter to Mobile and San Francisco, deduction of freight charges to San Francisco would yield the highest uniform f.o.b. prices. The New York Seaport contends that the invoiced f.o.b. values do not fairly reflect the full market value of

the merchandise. They conclude that the export value as defined in section 402(b) may not be satisfactorily determined and therefore the proper basis for appraisement is the U.S. value as defined in section 402(c) of the Tariff Act of 1930, as amended.

The importer's representative urges that the instant case "stands on all fours" with the Customs Court ruling in reappraisement decision 4994. That decision held that where a higher duty than that which was actually assessed was included by the seller in his cost, insurance, and freight duty paid price, "only the exact N.D.C. charges used to calculate the selling price" were "deductible." The decision in REAP 4994 is clearly distinguishable from the instant case. In REAP 4994, the erroneous duty in the cost, insurance, and freight price was the result of the exporter's ignorance of the applicable TSUS provision for the merchandise involved. In the instant case, the error between the estimated and actual freight charges was known by the exporter. Therefore, the exporter's mistake of fact present in REAP 4994 is absent in the instant case.

The district director, relying on Customs ruling 400097, dated April 25, 1974, and CIE 1148/58 and the supplement of January 19, 1960, would determine export value as the f.o.b. unit price plus the excess of the estimated freight charges over the least actual freight expenses. CIE 1148/58 and its January 1960 supplement dealt with the dutiable status of inland freight charges in the United States included in the value of merchandise exported from Canada and Mexico and are not relevant to the instant case. Headquarters 400097 dealt with a shipment made on a cost, insurance, and freight basis with freight estimated at conference freight rules. The merchandise was actually shipped on a nonconference vessel utilizing lower non-conference rates. The ruling stated that, "where shipments are made on cost, insurance, and freight basis, the actual expenses of freight and barging may be deducted to establish an f.o.b. price." For the reasons set forth below we do not agree that the district director's proposal is the proper method of calculating the export value of the merchandise involved in the instant case.

It is well established that charges accruing subsequent to the time of shipment are not ordinarily includible in dutiable export value. *United States v. International Commercial Co. Inc. and Armour & Co.*, 28 Cust. Ct. 629, Reap. Dec. 8112 (1952). Since actually incurred ocean freight accrues subsequent to the time of shipment, it has been held not to be a part of export value, *The John A. Steer & Co. v. United States*, 30 Cust. Ct. 504, Reap. Dec. 8196 (1953) and cases cited therein. The district director's proposed method of calculating export

value is fatally defective in that it results in either including part of the actual shipping cost to Mobile in the export value or the establishment of more than one export value. The first alternative is clearly contrary to the holding of the court in *John Steer, supra*. The second alternative is contrary to the statutory definition of export value. *United States v. Josef Mfg., Ltd.* 62 Cust. Ct. 763, R.D. 11616 (1969), aff'd 59 CCPA 147, C.A.D. 1057 (1972), involved the sale of goods to the United States at uniform CIF prices regardless of the destination. The appraiser contended that the export value could be determined by subtracting an arbitrary freight charge, found to be the freight charge from the manufacturer to New York, from the cost, insurance, and freight values. The trial judge concluded that:

Export value could not be determined by deducting an arbitrary amount for freight; that delivered price was not per se an export value under the statute; that the delivered price to all purchasers, with varying legal deductions for freight depending on the place of delivery, did not serve the purpose of the statute to establish one price at which the dresses were freely sold; and that, therefore, in the absence of such price, the export value was the price at which the imported dresses were freely offered to all purchasers in the United States, f.o.b., Montreal. 64 Cust. Ct. at 867.

Since export value may not be determined by the use of an arbitrary deduction representing the actual freight costs incurred in shipping the merchandise to one point only, it remains to be seen if the f.o.b. price list represents an export value under section 402(b).

The district director contends that the price list showing f.o.b. and cost, insurance, and freight prices can only be considered as showing fictitious or "estimated" f.o.b. prices since there is no evidence that there have ever been any sales at f.o.b. prices. Furthermore, the price list submitted to the district director reflects the same C & F value for Pacific and Gulf Coasts. The New York Seaport's Duty Assessment Branch also concluded that the exporter's f.o.b. price list did not satisfy the statutory requirements for export value. Since the exporter did not return the excess estimated freight charges, the f.o.b. prices have, in effect, been increased by an amount equal to the difference between the actual and estimated charges. Therefore, the f.o.b. price lists do not fairly reflect the full market value for the unit sales and may not be used as the basis for export value.

In the absence of an export value, appraisement must be made under the next statutory basis of appraisement, U.S. value, if U.S. value can be determined. If there is no U.S. value, then appraisement will be made on the basis of constructed value (sec. 402, Tariff Act of 1930, as amended).

(C.S.D. 79-272)

**Vessel Stores, Supplies and Equipment: Fire Extinguishers Purchased Abroad; Remissibility of Duty**

Date: December 27, 1978

File: VES-13-12-R:CD:C

103712 MKT

This decision concerns the timeliness of a petition for remission of duty on the foreign purchase of vessel equipment and the relevance of Materials Transportation Bureau Regulations as a ground for remission of that duty.

*Issues.*—1. Whether a lack of qualified secretarial assistance excuses a tardy petition filed under section 4.14(k), Customs Regulations, for remission of duty on a foreign purchase of equipment?

2. Whether the purchase of fire extinguishers to comply with Materials Transportation Bureau Regulations governing the carriage of dangerous or flammable cargo warrants remission pursuant to title 19, United States Code, section 1466(b)(1)?

*Facts.*—On August 24, 1978, the master of the (vessel) purchased seven fire extinguishers in Yokohama, Japan, to comply with title 49, United States Code, sections 1804 and 1809(a)(1), and with Materials Transportation Bureau Regulations section 176.315(d) (49 CFR 176.315(d)), all of which petitioner refers to as Coast Guard regulations. The regulations require additional fire extinguishers in the vicinity of flammable or combustible liquids. The cargo loaded on the vessel in Yokohama contained fireworks and motor vehicles which the petitioner alleges are classified as cargo subject to the requirements of section 176.315(d).

The petitioner submitted a petition 34 days after the denial of relief by the chief liquidator for remission of duty on the cost of the fire extinguishers. The petitioner requests relief on the grounds that the safety of the vessel and its crew and that Federal statutes and regulations required the purchase. According to the petitioner, a shortage of qualified secretarial assistance delayed the filing of the petition.

*Law and analysis.*—1. The policy of the Customs Service is to discourage delays in filing petitions under section 4.14(k), Customs Regulations. However we have ruled that in meritorious cases, a district director may extend the 30-day period prescribed for a petition for review of his decision on an application requesting relief under title 19, United States Code, section 258, now title 19, United States Code, section 1466 (CIE 11/68).

Generally, we will not consider meritorious an excuse for a delay

based on a lack of qualified secretarial assistance because this circumstance is entirely within the control of the petitioner. In this case, however, we consider the 4-day delay in filing to be minor and we overlook it in the absence of a history of delay on the part of this petitioner.

2. Section 1466(b)(1) provides for the remission of duty on the cost of equipment purchased abroad, if the vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into a foreign port and purchase equipment or make repairs to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination. The petitioner argues that the remission of duty on the cost of the purchase of the fire extinguishers abroad is warranted under section 1466(b)(1) because the master purchased the extinguishers to comply with Materials Transportation Bureau Regulations section 176.315(d). Section 176.315(d) requires that a certain number and type of fire extinguishers be accessible to any packaged flammable or combustible liquid and suitable for use with the lading. In the absence of evidence on the point, we will assume for the sake of argument that the fireworks and the motor vehicles involved contain flammable or combustible liquids and thus section 176.315(d) is applicable.

The Customs Service has ruled that Coast Guard regulations requiring surveys and tests were not determinative of questions of dutiability or remission of the cost of those surveys and tests under the vessel repair statute. This principle applies equally in this case. While the purchase of fire extinguishers to comply with section 176.315(d) is related to the safety of the vessel, the purchase was compelled by the \$10,000 penalty for a failure to comply with the regulation (49 U.S.C. 1809(a)(1)). The purchase was not compelled by the stress of weather or other casualty. We have no authority to remit duty assessed on the cost of equipment purchased abroad for the safety of a vessel in the absence of a finding of the stress of weather or any other casualty.

*Holding.*—1. We find the 4-day delay in filing the petition for remission of duty pursuant to section 4.14(k), Customs Regulations, to be minor and accept the petition in the absence of a history of delay on the part of the petitioner.

(2) The purchase of fire extinguishers to comply with regulations governing the carriage of flammable or combustible liquids is not compelled by stress of weather or other casualty and thus does not warrant remission of the duty on the cost of the purchase pursuant to section 1466(b)(1). Remission of the duty on the fire extinguishers is denied.

(C.S.D. 79-273)

**Vessel Repairs: Refund of Duty on Repairs Performed Abroad Where  
U.S. Drydock Facilities Not Available**

Date: January 10, 1979

File: VES-13-R:CD:C

103772 JM

This ruling concerns a petition filed under 4.14(k), Customs Regulations, for remission of duties assessed on the cost of foreign repairs to an American-flag vessel.

*Issues.*—Are duties on the value of foreign repairs to an American-flag vessel remissible if repair of the vessel in the United States would delay the vessel over 2 weeks because the only drydock on the east coast of the United States capable of handling the vessel was unavailable?

*Facts.*—While transiting the Panama Canal on January 8 and 9, 1976, the propeller and shell plating of the (vessel name) were damaged when the vessel grounded and was struck by a tugboat. The vessel proceeded to Elizabeth, N.J., where temporary repairs were effected. The petitioner attempted to arrange drydocking at Newport News, Va., but was advised by Newport News shipbuilding that the only drydock capable of handling the vessel was filled through February 4, 1976. On January 20, 1976, the vessel proceeded from Elizabeth, N.J., to Rotterdam where permanent repairs were made.

*Law and analysis.*—Title 19, United States Code, section 1466, provides for payment of an ad valorem duty of 50 percent on the cost of foreign repairs to a vessel documented under the laws of the United States to engage in the foreign and coasting trade. Section 1466 provides that the Secretary of the Treasury is authorized to remit or refund such duties if the vessel was compelled, by stress of weather or other casualty, to put into such foreign port and make the repairs to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination.

In CIE 1325/58, we held that the stress of weather or casualty which necessitated the repairs must have been experienced during the course of the same voyage on which the repairs were made, and not during a prior voyage.

CIE 1262/60 holds that relief is not warranted where repairs are deferred for a considerable period after the inclement weather or other casualty occurs, and the vessel, nevertheless, remains in trade, in an unrepaired condition, as such repairs are not necessary to secure the safety and seaworthiness of the vessel concerned.

In CIE 429/61 we held that there is no authority to remit duty

assessed on the cost of repairs effected in foreign ports because the only U.S. port capable of serving the vessel concerned was closed by labor trouble. In a decision dated July 7, 1977, we denied relief from duty on the costs of foreign repairs to the (vessel name) even though no U.S. drydock facilities could accommodate the (vessel name). This action was taken because the statute does not give us authority to grant relief on the basis that adequate facilities to repair a vessel do not exist in the United States.

*Holding.*—The fact that adequate facilities would not be available in the United States for more than 2 weeks after her arrival to repair an American-flag vessel does not warrant remission of the duty assessed on the cost of foreign repairs.

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(C.S.D. 79-274)

Export Value: Whether Certain Supporting Evidence is Sufficient in the Face of Contradictory Circumstantial Evidence

Date: January 23, 1979

File: R:CV:V BS

055372

To: Area Director of Customs, New York Seaport, N.Y. 10048

From: Director, Classification and Value Division.

Subject: Internal Advice No. 152/78; appraisalment of folding scissors from Hong Kong.

The issue in this matter is whether the evidence supports a statutory export value. The foreign supplier and importer are not related within the meaning of section 402(g)(2) of the Tariff Act of 1930, as amended.

The merchandise is invoiced to the importer at a price of \$1.74 per dozen. If valued over 50 cents but not over \$1.75 per dozen, the scissors would be classified under TSUS item 650.89 at the rate of 3.75 cents each plus 11 percent or free of duty under the Generalized System of Tax Preferences (GSP). If valued over \$1.75 per dozen, the merchandise would be classified under TSUS item 650.91 at the rate of 10 cents each plus 22½ percent and would not be subject to GSP.

The importer claims that export value as represented by the invoice price is the proper basis of appraisalment. The evidence supporting such claim consists of the invoices and related documents including purchase orders and confirmations between the parties; a letter from the manufacturer providing that the merchandise is offered and sold at these same prices to anyone who wishes to buy it without restrictions as to its disposition; and confirmation notes and invoices reflecting



these same prices for such merchandise sold to two other unrelated U.S. importers. The foreign supplier states that it has been able to maintain sales at this price level due to increased productivity and reduction in material costs, and that a normal profit margin is made on these sales.

It is apparent from the record that if the invoice prices are accepted as bona fide, then such values would represent export value. However, you advise that all such entries invoiced at \$1.75 per dozen and below are closely scrutinized, and based on the evidence, you believe these prices should be rejected. In your opinion, there is considerable doubt that the price of \$1.74 per dozen was the actual price paid for the merchandise. This view is based on the following facts:

(1) In 1976 scissors similar to those sold by the foreign supplier were being invoiced by three other sellers in Hong Kong at prices ranging from \$2.20 f.o.b. to \$2.60 f.o.b.; these suppliers ceased shipments to the United States since they could not compete with other sellers willing to invoice the merchandise at \$1.75 per dozen or below.

(2) A sales memorandum in the record dated April 6, 1976, evidences a transaction between this supplier and another importer through a buying agent reflecting a price for the merchandise of \$1.76 per dozen exfactory, without the additional inland freight charges which are included in the subject invoice prices.

(3) In February 1976, similar merchandise (from the subject supplier) was entered through Chicago by a different importer at a price of \$1.75 per dozen; however, when advised that the import specialist intended to substantially advance the value, the importer submitted a sales note reflecting a price of \$1.96 per dozen.

It is your opinion that while the record may not establish that the invoices are fraudulent, the evidence creates sufficient justification to reject the invoice prices as representing export value.

We do not agree that the invoice prices can be rejected on this basis. Circumstantial evidence which creates doubt as to the bona fides of the invoice prices may invite closer scrutiny of the transaction, but cannot be used to reject such prices if unsupported by evidence establishing such falsity. The parties to the transaction have declared the invoice prices to be true and correct, and the evidence does not establish otherwise. Under the circumstances, these invoice prices should be used for purposes of determining an export value, assuming the statutory criteria are satisfied.

However, if a foreign inquiry is undertaken, as is apparently contemplated, and additional evidence is uncovered which establishes that the invoice prices are not bona fide, then, of course, appraisalment should be made in accordance with the facts as established.



(C.S.D. 79-275)

Value: Merchandise of the Same General Class or Kind and the Usual Profit Incurred in Sales of Such Merchandise for Constructed Value Purposes

Date: January 23, 1979

File: R:CV:V DW

541652

To: District Director of Customs, Detroit, Mich. 48226.

From: Director, Classification and Value Division.

Subject: Internal Advice No. 51/77; appraisement of molds for automobile parts.

This is in response to your inquiry concerning the proper basis of appraisement of certain molds.

The merchandise in question consists of custom-made molds used in the auto industry. The molds are produced by machine tooling job shops who bid competitively on the production contract. Each mold is for a specific automobile part, and requires a great deal of handwork, both in the preliminary and finishing stages. Because of the precision handwork, costs vary and the anticipated profit of a job is not always realized. It was also noted that due to a turndown in the automotive industry (the major market for the molds), price quotes have generally aimed for a lower percentage of profit. Several specific questions were raised concerning the proper basis of appraisement and if it is necessary to resort to constructed value, what is the proper amount of profit to be included. We will consider each of the questions in order.

The initial issue posed in your letter was whether export value, section 402(b), Tariff Act of 1930, as amended, may be used as a basis of appraisement. Export value would be calculated using the bid price for each mold. Under the circumstances of sales set forth in your letter, we believe that the bid price could represent a freely offered price to a selected purchaser. Since the bidding process is competitive, we believe that the bid which was accepted would generally reflect the fair market value for such mold. However, you stated in your letter that after the bid has been entered and accepted for a mold, further technical changes are often made. If these technical changes are made with the aid of the automobile manufacturer, we believe that these may constitute assists and preclude a finding of export value. Similarly, you noted that a "parts print" is provided when bids are solicited. Assuming the parts print consists of more than rough specifications then this would constitute an assist also.

One exception has been established to the rule that blueprints

would constitute an assist and thereby exclude export value as a basis of appraisement. If, in a competitive bidding situation, any interested party may obtain a copy of the blueprints the information is considered in the public domain and its value would not be dutiable (R:CV:V SPK 541405 dated April 12, 1977). We do not have information in this case concerning the availability of the parts prints at the time of bidding and therefore cannot state whether they would constitute a dutiable assist or not.

Assuming the existence of assists which precludes export value, U.S. value, section 402(c), Tariff Act of 1930, as amended, would also be precluded since the molds are not offered for sale in the United States. The correct basis of appraisement would be constructed value. The following questions relate to appraisement upon the basis of constructed value.

1. Are such customized molds a "general class or kind" of merchandise even though they vary in specification and are used to produce entirely distinct parts?

The phrase "same general class or kind" of merchandise is used in section 402(d)(2), Tariff Act of 1930, as amended, which requires that constructed value include "an amount for general expenses and profit equal to that usually reflected in sales of merchandise undergoing appraisement \* \* \*." In the market under consideration it is necessary to determine if the molds are all of the same general class or kind of merchandise. If the molds are not of the same general class or kind, then the actual profit incurred for each mold would be the "usual" profit.

In considering this issue, we note that the phrase, as used in section 402(d)(2), has not been defined by the courts. However, the phrase "merchandise of the same class or kind" which is found in sections 402(c)(1) and 402a(f)(4) has been discussed in a number of cases. This office has held in an intraoffice memorandum that the terms "general class or kind" and "class or kind" are indistinguishable and that court cases which deal with "same class or kind" apply with equal force to situations involving the "same general class or kind" (copy of the memorandum is attached). In the New York memorandum accompanying this file (APPI-02-S:C:D7-PSK 243) it is suggested that relevant cases are found in connection with General Interpretative Rule 10(e)(i) which covers tariff classifications controlled by use. The analogy to these cases is that they seek to classify merchandise by use and consider the adjunct question of what a particular "class" of merchandise is used for. While these cases are helpful, it is clear that the courts, in considering a "class or kind" of merchandise, have not looked solely to "use" to define the term. Therefore, we think these cases are not controlling.

The courts have generally concluded that the term "same class or kind of merchandise" is broader and more inclusive than the term "such or similar", which is statutorily defined, *Omni Products Co. v. United States*, R.D. 11291 (1971). However, the guidelines for determining the parameters of what constitutes a "class or kind" of merchandise are generally lacking. As was noted in a recent ruling, these cases do not clearly delineate the court's rationale for circumscribing a particular class or kind of merchandise. The courts have generally addressed the scope of the appropriate class or kind only briefly, and in conclusory terms (R:CV:V JAS 540765, dated October 13, 1977).

Perhaps the case which falls closest to this situation is that of *United States v. Heemsoth-Kerner Corp.*, C.A.D. 252 (1943). In that case, the court found that fonts (sets) of printing type sold in Germany and fonts of printing type sold in the United States, manufactured by the same company, were of the "same general character." The court stated that the type was made of the same raw material, and, although being different in size and weight, this difference was too small to affect production costs. Thus, the court looked to component materials, size and weight, costs or profits, and (implicitly) use, as criteria to establish the same general class or kind. In later cases the courts have not always used this profit or cost factor in determining the same general class or kind. Where the courts have accepted the actual profit of a manufacturer as being representative for the same general class or kind of merchandise, reference has been made to "the weight of all the evidence". *United States v. Jovita Perez*, C.A.D. 407 (1949). We would also note that the use of the profit or cost factor to determine the same general class or kind reverses the plain meaning of the statute which calls for determining the same general class or kind to find a usual profit.

Based on the criteria set forth in *Heemsoth-Kerner* of component materials and use, as being a method of determining the same general class or kind, we are of the opinion that the molds can be considered as being of the same general class or kind. Although the molds vary in size, weight, and cost, we believe that they are sufficiently similar in the method by which they are made to consider them of the same general class or kind. The analogy was drawn in the New York memorandum to this file of the molds being essentially tools. We believe that analogy is partially correct. For instance, we would not find a screwdriver to be of the same general class or kind as a hammer, although both are tools; however, we would be more likely to find two types of hammers of the same general class or kind. Similarly, although the molds may be different in size, they perform the same functions.

2. Is it considered in the "ordinary course of trade" to realize less than a usual profit or a loss as a result of:

- (a) Certain market conditions;
- (b) Unforeseen breakdowns, material spoilage, or other production factors;
- (c) Errors in judgment on the part of the individual who quoted the purchase price.

The term "in the ordinary course of trade" in section 402(d)(2) does not refer to the profit to be calculated in determining constructed value. A careful reading of the above-cited section shows that the "ordinary course of trade" refers to sales of the same general class or kind. Thus, if, in this situation, a mold as competitively bid upon by unrelated parties at arm's length, as is the practice in this industry, the sale would be within the "ordinary course of trade" regardless of whether a loss or profit is incurred. What must be determined is the "profit" equal to that *usually* reflected in such sales. This is discussed below.

3. Is "usual profit" represented by:

- (a) The profit realized upon the mold under appraisement if it happens to be:
  - 1. Higher than the anticipated profit.
  - 2. The anticipated profit.
  - 3. Less than anticipated.
  - 4. A minimal profit.
  - 5. An actual loss.
- (b) The profit reflected as a percentage factor derived from the previous year's sales of the job shop tooling (mold) industry:
  - 1. In the geographic area.
  - 2. In the entire Canadian tooling industry.
- (c) The profit reflected as a percentage factor derived from the firm's annual statement based on the previous year's sales of the producer of the merchandise under appraisement.

Carrying forward from our prior analysis, if it can be determined that custom-made molds are the same general class or kind of merchandise then appraisement based on constructed value should utilize the "usual" (general expense and) profit for the industry. If the usual profit figure is unavailable or if a firm is the sole manufacturer of merchandise of the same general class or kind then its actual profit becomes the usual profit, *United States v. Jovita Perez*, C.A.D. 407 (1949).

No authority exists for including anticipated profits in this calculation. Section 402(d)(2), Tariff Act of 1930, as amended, states that constructed value should include an amount for general expenses and profit usually reflected in sales of merchandise of the same general class or kind "\* \* \* which are made by producers in the country of exportation \* \* \*." There is no statutory limitation on the geographic area in the country of exportation in the consideration of what a usual profit is. Thus, it would be necessary to consider the profits of the

tooling job shops in the entirety of Canada if those producers are making automobile part molds for exportation.

Finally, the question was raised as to whether losses incurred in the production of a particular mold should be considered in appraisement. Since constructed value looks to the "usual" profit, it may be assumed that an industry must turn a profit to continue to function. "Usual" profit, therefore, would under these circumstances not be a negative (loss) factor, although in certain circumstances it could be zero.

## *General Notices*

(19 CFR part 141)

Proposed amendment to the Customs Regulations relating to discharge of an importer's liability for duties

**AGENCY:** U.S. Customs Service, Department of the Treasury.

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to amend the Customs Regulations by establishing an alternative procedure to provide that an importer who pays Customs duties on imported merchandise through a licensed customhouse broker may submit a separate check for the duties, payable to the U.S. Customs Service, to the broker. Presently, an importer often furnishes his broker one check covering both duties and the broker's fees and charges, and the broker then pays the duties to Customs on behalf of the importer. While this alternative procedure would not discharge the importer's personal liability for payment of duties, it will help insure the importer that this payment will be received by Customs in a timely manner.

**EFFECTIVE DATE:** August 31, 1979.

**ADDRESS:** Comments (preferably in triplicate) may be addressed to the Commissioner of Customs, attention: Regulations and Legal Publications Division, U.S. Customs Service, 1301 Constitution Avenue NW., room 2335, Washington, D.C. 20229.

**FOR FURTHER INFORMATION CONTACT:** James Bartley, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-5765.

**SUPPLEMENTARY INFORMATION:**

### **BACKGROUND**

Section 141.1(b), Customs Regulations (19 CFR 141.1(b)), provides that duties, both regular and additional, are a personal debt of the importer which may be discharged only by payment in full to Customs, unless relieved by law or regulation. Direct payment of duties from the importer to Customs is the usual method of payment. However, many importers use licensed customhouse brokers to transact Customs

business on their behalf. In such cases, the importer often will issue the broker one check covering both broker's fees and charges and Customs duties, and the broker then will pay the duties to Customs by a check drawn on the broker's account.

Payment of the duties to the broker does not discharge the importer's personal liability because payment must be received by Customs before the liability is discharged. Submission of a Customs bond with an entry is solely for the protection of the revenue and does not relieve the importer of liabilities incurred as a result of his importing merchandise into the United States.

To aid importers in discharging their personal liability for the payment of duties, it is proposed to amend section 141.1(b) to establish an alternative procedure providing that importers may elect to submit a separate check for duties, payable to the "U.S. Customs Service," to the broker. Although payment of duties by a separate check to the broker would not discharge the importers' liability until the check is received by Customs, this alternative procedure, which has been in effect in the New York Customs Region since February 1977, could help insure the importer that Customs receives the payment in a timely manner. An importer, of course, could continue to submit one check to the broker covering both the duties and the broker's fees and charges.

#### COMMENTS

Before adopting this proposal, consideration will be given to any written comments submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.8(b), Customs Regulations (19 CFR 103.8(b)), during regular business hours at the Regulations and Legal Publications Division, room 2335, Headquarters, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

#### INAPPLICABILITY OF EXECUTIVE ORDER 12044

This document is not subject to the Treasury Department directive implementing Executive Order 12044, "Improving Government Regulations," because the proposal was in an advanced stage of preparation before May 22, 1978, the effective date of the directive.

#### DRAFTING INFORMATION

The principal author of this document was Shannon McCarthy, Regulations and Legal Publications Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.



## AUTHORITY

This amendment is proposed under the authority of R.S. 251, as amended (19 U.S.C. 66), and section 624, 46 Stat. 759 (19 U.S.C. 1624).

## PROPOSED AMENDMENT

It is proposed to amend paragraph (b) of section 141.1, Customs Regulations (19 CFR 141.1(b)), and the section heading thereto to read as follows:

## 141.1 Liability of importer for duties.

(a) \* \* \*

(b) *Payment of duties.*

(1) *Personal debt of importer.*—The liability for duties, both regular and additional, attaching on importation constitutes a personal debt due from the importer to the United States which can be discharged only by payment in full of all duties legally accruing, unless relieved by law or regulation. It may be enforced notwithstanding the fact that an erroneous construction of law or regulation may have enabled the importer to pass his goods through the customhouse without payment. Submission of a Customs bond with an entry is solely to protect the revenue of the United States and does not relieve the importer of liabilities incurred from the importation of merchandise into the United States.

(2) *Methods of payment.*—An importer may pay duties to Customs directly or, if transacting Customs business through a licensed customhouse broker, may issue the broker either—

(i) One check covering both Customs duties and the broker's fees and charges, in which event the broker shall pay the duties to Customs by a check drawn on the broker's account, or

(ii) Separate checks, one covering the duties, payable to the "U.S. Customs Service", for transmittal by the broker to Customs, and the other covering the broker's fees and charges.

In any case, the importer remains personally liable for the duties until payment is received by Customs.

R. E. CHASEN,  
*Commissioner of Customs.*

Approved: June 18, 1979.

RICHARD J. DAVIS,  
*Assistant Secretary of the Treasury.*

[Published in the Federal Register, July 2, 1979 (44 F.R. 38571)]

# Decision of the U.S. Court of Customs and Patent Appeals

(C.A.D. 1227)

PISTORINO & Co., INC. v. THE UNITED STATES No. 79-4 (— F. 2d —)

## 1. CLASSIFICATION—ACUPUNCTURE DOLLS—TSUS

Customs Court judgment, that importer had not overcome the presumption of correctness of the classification of certain human figures imported from the People's Republic of China under TSUS 737.15, and had not proven its claimed classification under TSUS 273.35 correct, affirmed.

## 2. COMMON MEETING—USE

The common meaning of "model," as used in TSUS 737.15, neither entails nor requires consideration of an article's use.

## 3. ID.

The present models provisions encompass all models and do not differentiate between the animate and inanimate.

## 4. ID.

Because a manual may accompany either a model or a chart, as those terms are commonly understood, the presence of a manual cannot control the designation of the imported figures.

U.S. Court of Customs and Patent Appeals, June 14, 1979

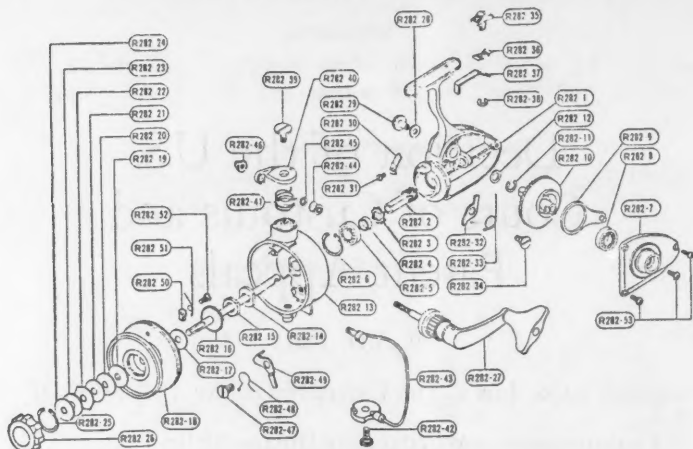
Appeal from U. S. Customs Court, C.D. 4763

[Affirmed.]

*Walter E. Doherty, Jr.* (Doherty and Melahn) attorneys of record, for appellant, *Eleanor D. Acheson* (Ropes & Gray) of counsel.

*Barbara Allen Babcock*, Assistant Attorney General, *David M. Cohen*, Director, *Joseph I. Liebman*, *Susan Handler-Menahem*, for the United States.

[Oral argument on June 4, 1979 by *Walter E. Doherty, Jr.*, for appellant and by *Susan Handler-Menahem* for appellee.]



### Relevant Statutes

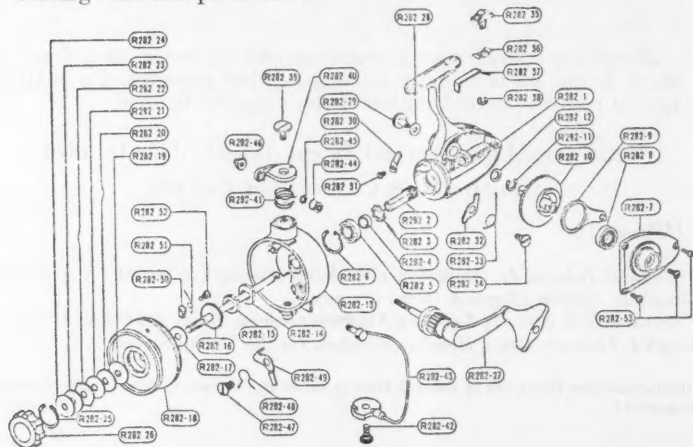
Both the Customs Service and the importer urged that the imported merchandise is properly classifiable under Schedule 7 of TSUS, part 5, subpart B. The relevant portions read:

### SCHEDULE 7.—SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

Part 5.—Arms and Ammunition; Fishing Tackle; Wheel Goods; Sporting Goods, Games and Toys

### Subpart B.—Fishing Tackle

Fishing reels and parts thereof:



*Relevant Statutes*

Both the Customs Service and the importer urged that the imported merchandise is properly classifiable under Schedule 7 of TSUS, part 5, subpart B. The relevant portions read:

SCHEDULE 7.—SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

\* \* \* \* \*

Part 5.—Arms and Ammunition; Fishing Tackle; Wheel Goods; Sporting Goods, Games and Toys

\* \* \* \* \*

*Subpart B.—Fishing Tackle*

\* \* \* \* \*

Fishing reels and parts thereof:

(C.A.D. 1228)

DAISY-HEDDON, DIV. VICTOR COMPTOMETER CORP. v. THE UNITED STATES

(— F. 2d —)

1. CLASSIFICATION—FISHING REELS—TSUS

Judgment of Customs Court sustaining assigned classification of imported merchandise as fishing reels under TSUS item 731.20 rather than as parts of fishing reels under TSUS item 731.26, affirmed.

2. PARTS PROVISIONS—UNFINISHED ARTICLES PROVISIONS

Competition between parts provisions and unfinished articles provisions of TSUS arises by virtue of General Interpretative Headnote 10(h).

3. ID.—CLASSIFICATION—SUBSTANTIALLY COMPLETE ARTICLE

Basis for decision that importation may be classified as an unfinished article, rather than as parts of that article, is that the importation constitutes a substantially complete article.

4. CITED CASE OVERRULED

*Authentic Furniture Products, Inc. v. United States* is expressly overruled.

5. CLASSIFICATION—*Eo nomine*—USE

Omission of a part essential to the use of *eo nomine* designated article does not preclude classification as the article in an unfinished condition.

6. DETERMINATION OF WHETHER AN ARTICLE IS SUBSTANTIALLY COMPLETE

In determining whether an importation is a substantially complete article, and may thus be classified as an unfinished article, rather

than as parts of that article, one or more of the following factors may be relevant and should be considered by the trier of fact: (1) Comparison of number of included and omitted parts; (2) comparison of time and effort required to complete the article with that required to place it in condition as imported; (3) comparison of cost of omitted parts with cost of included parts; (4) significance of omitted parts to the overall functioning of the complete article; (5) trade customs, i.e., does the trade consider the importation as an unfinished article or as parts of that article.

#### 7. BURDEN OF PROOF

Burden on importer in classification case is a dual one; it must be shown that the assigned classification is in error, and that the claimed classification is correct.

U.S. Court of Customs and Patent Appeals, June 21, 1979

Appeal from U.S. Customs Court, 4765

[Affirmed.]

*S. Richard Shostak* (Stein, Shostak, Shostak & O'Hara, Inc.) attorneys of record, for appellant.

*Barbara Allen Babcock*, Assistant Attorney General, *David M. Cohen*, *Joseph I. Liebman*, *Saul Davis* for the United States.

[Oral argument on June 4, 1979 by *S. Richard Shostak* for appellant and by *Saul Davis* for appellee]

Before *MARKEY*, Chief Judge, *RICH*, *BALDWIN*, and *MILLER*, Associate Judges, and *PENN*,\* Judge.

*RICH*, Judge.

[1] This appeal is from the judgment of the United States Customs Court, 81 Cust. Ct. 55, C.D. 4765, 460 F. Supp. 680 (1978), dismissing the importer's action challenging the classification of imported merchandise as fishing reels under item 731.20 of the Tariff Schedules of the United States (TSUS) as modified by T.D. 68-9, rather than as parts of fishing reels under TSUS item 731.26 as modified by T.D. 68-9. We affirm.

Five different articles are involved. They are described variously on exporter's invoices as "Heddon closed face reels," "fishing reel parts" and "Heddon fly reels," and on special customs invoices and consumption entries as "fishing reel parts," "fishing reel \* \* \* housing" and "fishing reels." We shall refer to them by the importer's model number designations associated with the samples in evidence, models 233, 281, 282, 283, and 284.

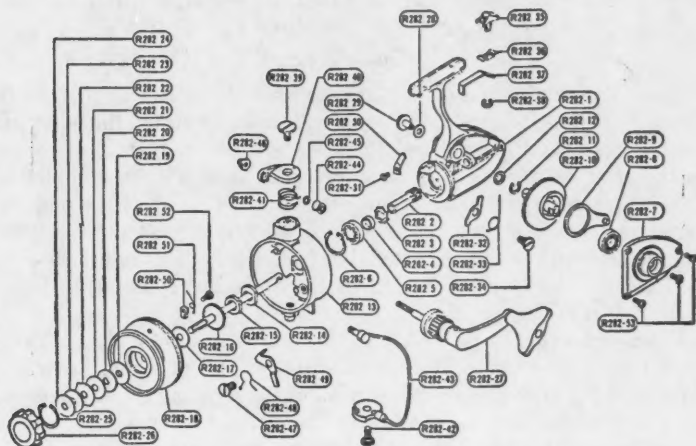
Each article, as imported, consists of a combination of subassemblies

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\*The Honorable John G. Penn, U.S. District Court for the District of Columbia, sitting by designation.

of a particular fishing reel of the spinning reel type roughly comprising the main housing with its internal gearing, the rotating flyer assembly and spool shaft, and the bail and bail lock assembly. Each article lacked certain parts necessary to make a complete reel. Model 233 lacked the spool, drag knob, handle, side plate, and three screws; models 281 and 282 lacked the spool, drag knob, handle and handle nut, spool washer, and handle arm shaft washer; models 283 and 284 lacked the spool, drag knob, handle and handle nut, and handle arm shaft washer.

To show the makeup of a typical complete spinning reel we reproduce the exploded drawing of the parts list for model 282, exhibit 5.



#### *Relevant Statutes*

Both the Customs Service and the importer urged that the imported merchandise is properly classifiable under Schedule 7 of TSUS, part 5, subpart B. The relevant portions read:

#### SCHEDULE 7.—SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

\* \* \* \* \*

Part 5.—Arms and Ammunition; Fishing Tackle; Wheel Goods; Sporting Goods, Games and Toys

\* \* \* \* \*

#### *Subpart B.—Fishing Tackle*

\* \* \* \* \*

Fishing reels and parts thereof:

	Reels:	
731.20	Valued not over \$2.70 each.....	23% ad val.
	* * * * *	
731.26	Parts.....	13.5% ad val.

In addition, General Interpretative Rule 10 is relevant and provides in pertinent part:

10. *General Interpretative Rules.*—For the purpose of these schedules—

(h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished;

(ij) a provision for “parts” of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

#### *Customs Court*

From its examination of the samples in evidence as exhibits, which the court regarded as “potent witnesses,” the court stated the following conclusions: (1) “The alleged housings are finished articles insofar as the state of manufacture is concerned,” and lack for completion only “mere assembly with various other parts”; (2) all of the omitted parts may be easily incorporated into the importations to complete the reels; and (3) concerning exhibit 1, at least, “all the action that is characteristically associated with the open-face spinning reel had been built into that article.”

Upon review of the testimony of the two witnesses for the plaintiff-importer and the two Government witnesses, all of whom have had experience in the fishing tackle portion of the sporting goods industry, the court further concluded that the importations were considered as “reels” rather than as “parts of reels” by those in the industry.

In order to resolve the competition between the unfinished articles provisions (existing by virtue of General Interpretative Rule 10(h), supra) and the parts provisions of TSUS, the court applied the test in *Authentic Furniture Products, Inc. v. United States*, 61 CCPA 5, C.A.D. 1109, 486 F. 2d 1062 (1973). Under that test, as the court viewed it, the absence of a “substantial or essential part” will preclude classification as the unfinished article and require classification under the parts provision. In applying that test, the court stated (81 Cust. Ct. at —, 460 F. Supp. at 683):

In the court’s opinion, the imported merchandise was properly classified as fishing reels within the purview of item 731.20. It is plain to see that when exhibit 1 was manipulated manually all the action that is characteristically associated with the open face spinning reel had been built into that article.

Thus, the bail could be cocked. And then it closed upon rotation around the turning flyer. The internal gears moved and rotated



the crankshaft in circular motion while at the same time causing the spool shaft to perform its customary reciprocal back and forth motion. This, to the court, constitutes the essence of a spinning reel. This action was imparted to the reel without the addition of the omitted parts. The spool, handle, and drag knob can be used to regulate, retard, or refine this action.

The Customs Court rejected the argument that the missing parts were essential because without them the imported merchandise could not be used for fishing. The court said: "The function of a reel of this kind is to *spin*. And the *spinning action* is achieved by the imported articles in the condition as imported" [*italic in original*].

Also rejected was appellant's attempt to compare the cost of the omitted parts against the cost of the imported articles. The court said that, while cost is a factor, to determine the substantiality of the omitted parts one "must weigh the relationship of the omitted parts against the included parts" and "assess the significance of the omitted parts in the total scheme of things."

#### OPINION

We find no error in the decision of the Customs Court. However, we find from a reading of appellant's brief an apparent misunderstanding of the test to be applied.

In *Authentic Furniture Products, Inc. v. United States*, 68 Cust. Ct. 204, C.D. 4362, 343 F. Supp. 1372 (1972), [2] the Customs Court was faced with the issue of deciding the proper classification between competing unfinished articles and parts provisions of TSUS, which competition arises by virtue of General Interpretative Rule 10(h). In its decision that the imported merchandise, consisting of unassembled pieces of bunk beds (namely posts, headboards, footboards, ladders, and guardrails, without the side rails necessary to form a complete bunk bed), was properly classifiable as parts of furniture rather than as unfinished furniture, [3] the Customs Court examined prior authority and then stated the existing test, "That parts of an article, when assembled, *must result in a substantially complete article*, for their classification as the article itself \* \* \*." [*Italic ours.*] 68 Cust. Ct. at 213, 343 F. Supp. at 1379.

In affirming the Customs Court decision, this court stated that there was "no error in the lower court's holding that parts of an article may be classified as the unfinished article itself only when the imported pieces constitute a substantially complete article \* \* \*." 61 CCPA at 6, 486 F. 2d at 1063. Thus, the court approved of the test set forth by the lower court, notwithstanding the fact that it then said (61 CCPA at 7, 486 F. 2d at 1064):

We consider the application of the test, whereby the absence of a substantial or essential part precludes classification as the

unfinished article itself, to be well founded in the case law so ably discussed by the lower court and aptly followed in the present case.

Appellant has seized on the word "essential" and has argued that, since the omitted parts of the reels here at issue are essential to their use by the ultimate consumer, classification as unfinished reels is improper. We do not agree.

In reading the majority opinion in *Authentic Furniture*, it must be emphasized that the court approved the test applied by the Customs Court and was not attempting to formulate another test or modify the test applied by the Customs Court. [4] However, the language of the majority opinion indicates that a different formulation of the test was in fact adopted. It has since caused some confusion, and, if improperly read, could result in decisions which are at odds with what we perceive to be the intent of Congress as expressed in general interpretative headnote 10(h). To the extent that the majority opinion in *Authentic Furniture* may be so read as providing a test other than the test used in that case by the Customs Court, it is expressly overruled for the reasons set forth below.

[5] If, as appellant argues, the omission of a part essential to the use of the eo nomine designated article would prevent classification as the article in an unfinished condition, there would be, in practical effect, no such thing as an unfinished article, since the omission of virtually any part from an otherwise complete article would prevent its use in the manner intended. See *Authentic Furniture Products*, 61 CCPA at 8, 486 F. 2d at 1064-65 (Miller, J., dissenting). Such is clearly not the intent of Congress, as evidenced by the very existence of General Interpretative Rule 10(h).

Further, the result in *Authentic Furniture Products* does not merely depend on the "essential" nature, be it functional or commercial, of the omitted side rails. It is abundantly clear from the opinion of the Customs Court, which was approved by this court, that the basis of the decision in that case was that "it is the determination of this court that the importations do not constitute a substantially complete article." 68 Cust. Ct. at 215, 343 F. Supp. at 1380. Such a determination does not depend merely on the presence or absence of an "essential" part.

[6] There are several factors which may come into play in the determination of whether an article is substantially complete. In a case, such as this, where the article is incomplete due to the omission of one or more parts, as opposed to where an article is incomplete because the material which comprises the article is in need of further processing, the following factors can be relevant: (1) Comparison of the number of omitted parts with the number of included parts; (2) comparison

of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; (4) the significance of the omitted parts to the overall functioning of the completed article; and, (5) trade customs, i.e., does the trade recognize the importation as an unfinished article or as merely a part of that article. This list of factors is not exhaustive; it must be recognized that fewer than all of the above factors, or additional factors, may come into play depending on the particular importation. The outcome of each case will always depend on the particular merchandise involved. It would be over-simplification of an essentially difficult juridical problem, often involving a determination of congressional intent, for us to attempt to provide anything more than guidelines for the trier of fact to follow in assessing a given case.

In the case at bar, we think that the lower court had an adequate basis upon which to decide that the importations are unfinished fishing reels. [7] Since the burden on the importer in a classification case is a dual one, it must be shown that the assigned classification is in error, and that the claimed classification is correct. *United States v. A. Johnson & Co.*, 66 CCPA —, C.A.D. 1218, 588 F. 2d 297 (1978); *Hayes-Sammons Chemical Co. v. United States*, 55 CCPA 69, C.A.D. 935 (1968). We do not think that either burden has been met. The reasoning used by the Customs Court in deciding that the importations are unfinished fishing reels because they are substantially complete is in harmony with the foregoing guidelines. Its conclusions are supported by the evidence and reflect consideration of factors (1), (2), (4), and (5).

The judgment of the Customs Court dismissing the action is affirmed.

# Decisions of the United States Customs Court

United States Customs Court

One Federal Plaza  
New York, N.Y. 10007

*Chief Judge*

Edward D. Re

*Judges*

Paul P. Rao  
Morgan Ford  
Scovel Richardson  
Frederick Landis

James L. Watson  
Herbert N. Maletz  
Bernard Newman  
Nils A. Boe

*Senior Judge*

Samuel M. Rosenstein

*Clerk*

Joseph E. Lombardi

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## *Customs Decision*

(C.D. 4806)

NOVO ENZYME CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

### *Microbial milk-clotting enzymes*

An importation of microbial enzyme preparation, used for the manufacture of cheese, classified under item 437.49, Tariff Schedules of the United States, as other enzymes and ferments, *held* properly subject to classification under item 437.46, Tariff Schedules of the United States, as rennet.

*Eo nomine* designations without terms of limitation include all forms. The meaning of such designation is determined as of the date

of the tariff statute and includes all articles subsequently created which fall within the scope of the provision. *Sears, Roebuck and Co. v. United States*, 46 CCPA 79, C.A.D. 701 (1959); *Hoyt, Shepston & Sciaroni, S. Blondheim & Co. v. United States*, 52 CCPA 101, C.A.D. 865 (1965).

In determining whether an *eo nomine* designation embraces an article, use may be considered in order to establish its identity. *United States v. Quon Quon Company*, 46 CCPA 70, C.A.D. 699 (1959).

Court No. 76-5-01079

[Judgment for plaintiff.]

(Decided June 15, 1979)

*Barnes, Richardson & Colburn* (David O. Elliott and Peter J. Fitch of counsel) for the plaintiff.

*Barbara Allen Babcock*, Assistant Attorney General (David M. Cohen, Chief, Customs Section; Steven P. Florsheim and Sidney N. Weiss, trial attorneys), for the defendant.

**FORD, Judge:** This action contests the classification of a microbial enzyme preparation, described on the import invoice as "Rennilase." Rennilase is used in the curdling of milk for the manufacture of cheese. The merchandise in issue was produced in Denmark and entered at New York.

The merchandise was classified under item 437.49 of the Tariff Schedules of the United States, as modified by T.D. 68-9, as "Enzymes and ferments: \* \* \* Other," at 5 per centum ad valorem. Plaintiff claims the proper classification is under TSUS item 437.46 which provides for "Enzymes and ferments: Rennet," free of duty. Specifically, these statutory provisions read as follows:

Tariff Schedules of the United States:

SCHEDULE 4.—CHEMICALS AND RELATED PRODUCTS

Part 3.—Drugs and Related Products

Subpart B.—Alkaloids, Antibiotics, Barbiturates, Hormones, Vitamins, and Other Drugs and Related Products

\* \* \* \* \*

Enzymes and ferments:

437.46	Rennet.....	Free
	* * * * *	
437.49	Other.....	5% ad val.

Plaintiff contends the enzyme preparation in question is "rennet" within the meaning of that term as used in item 437.46. The term

"rennet," it is alleged, encompasses a group of enzyme preparations which coagulate milk to produce a curd suitable for making cheese and, as such, includes all enzyme preparations, whether from animal, plant or microbial sources. This is so since item 437.46 is an *eo nomine* provision which includes all forms of the named article. Plaintiff asserts the microbial preparation Rennilase is a form of rennet.

Alternatively, plaintiff urges that item 437.46 is a use provision, that is, a provision by which the classification of the import is determined by the use to which the import is intended. Since Rennilase is exclusively used for making cheese, plaintiff claims it to be properly classifiable as rennet.

Defendant does not dispute that the enzyme preparation in question is principally used to make cheese. While rejecting the construction of item 437.46 as a use provision, defendant agrees with plaintiff that it is an *eo nomine* provision. Nevertheless, defendant maintains that plaintiff's definition of "rennet" is overbroad and incorrectly encompasses microbial enzyme preparations such as Rennilase.

Defendant maintains the term "rennet" refers only to milk-clotting enzyme preparations which are derived from the fourth stomach of ruminant animals. Defendant's definition does not recognize any plant source for rennet and only selectively recognizes animal sources. Defendant contends milk-clotting enzymes derived from four-stomached animals as cows, sheep, and goats constitute rennet, but enzymes extracted from pigs' stomachs are not rennet.

The record consists of testimony of 5 witnesses called on behalf of plaintiff and receipt in evidence of 18 exhibits. Plaintiff's witnesses included a representation of persons involved, both commercially and academically, in the enzyme and cheese fields. These witnesses included a quality control director of the plaintiff's corporation, a microbiologist for a pharmaceutical company, a university professor of food science, a management and research representative of an enzyme products corporation, and a recently retired scientist who was employed by a cheesemaking company for approximately 40 years.

Mr. William McMullen, with an M.S. in chemistry, has been director of analytical and quality control laboratories for plaintiff corporation for 7 years. Novo imports and sells enzyme products. Mr. McMullen's previous 22-year employment with Pfizer Co. included chemical and quality control work in the area of enzymes.

Dr. Joseph Sardinas, with a Ph. D. in microbiology, has been employed by Pfizer, Inc.<sup>1</sup> for 28 years. Pfizer is a multinational, pharmaceutical company. Dr. Sardinas holds seven patents in the enzyme field, one of which is related to milk-clotting enzymes.

<sup>1</sup> It is not clear from the record whether Pfizer & Co. is a subsidiary of Pfizer, Inc., but the two corporations appear to be interrelated.

Dr. Frank V. Kosikowski, with a Ph. D. in dairy chemistry and biochemistry and microbiology, has been a professor of food science at Cornell University for 32 years. He shares eight patents, which involve microbial enzymes, bacteria removal from milk, and dairy product packaging. The witness has performed consulting services for microbial enzyme companies, government agencies, and the United Nations.

Dr. Theodore Cayle is vice president and technical director of Dairyland Food Laboratories, which manufactures milk coagulants, various rennets, and other enzyme products for the manufacture of cheese. Prior to his association with Dairyland, Cayle was director of research at Wallerstein Co., Division of Baxter Laboratories, an enzyme manufacturer. He holds a Ph. D. in plant biochemistry and microbiology.

Plaintiff's final witness, Dr. J. B. Stine, was employed by Kraft Foods from 1934 until his retirement in 1976. Until 1962, Dr. Stine's duties at Kraft involved only cheese. After that date, his responsibilities included all Kraft products. His Ph. D. is in dairy bacteriology. In the past 10 or 12 years, Dr. Stine has served as chairman of nearly every cheese committee of the Committee of Government Experts concerning the Code of Principles of Milk and Milk Products.

Testimony by the plaintiff's witnesses established that an enzyme is a protein that works as a catalyst. The enzyme accelerates a reaction without entering into the action or being used up in it. The phrase "enzyme preparation" describes the biological suspension which acts as a carrier for the enzymes. This carrier contains the active agent and usually such other substances as water, sodium chloride, preservatives, bacteria, and other enzymes. An enzyme preparation may be in what is called suspended form, which is a liquid, or it may be in dehydrated form, that is, dried.

According to plaintiff's witnesses, enzymes are sometimes grouped or classified according to their source, but ordinarily they are classified by the function they perform. All five of plaintiff's witnesses testified that because of the function microbial milk-clotting enzymes perform in cheesemaking, they considered such enzymes rennet.

Dr. Sardinas testified that rennet's chief function in cheesemaking is coagulating milk to form a stable curd. The witness explained that coagulation is the result of splitting a bond in the casein. Milk contains casein which colloides in suspension. There are three types of casein, alpha, beta, and kappa. According to Dr. Sardinas:

\* \* \* the integrity of this casein colloid, the unit referred to as a mycele \* \* \* is guaranteed, as it were, by the kappa casein. The rennet enzyme can split a particular bond. The bond which joins one amino phenylalamine with another amino acid



methionine bond is a labile bond. It splits it into two parts. The consequence of this action is that the mycele, the colloid, destabilizes, and no one understands completely just why. There are at least three theories trying to explain what goes on in this complexity, but the sum total of the action is that the proteins, the alpha and beta proteins, along with some of the kappa casein, which is now called para-k-casein \* \* \* form a curd which, of course, is insoluble.

Dr. Sardinas noted that there are other enzymes besides rennet which will coagulate milk. However, rennet is different from these enzymes since it will create a stable curd that will maintain its essential character as a curd. The unique quality of rennet for making cheese is that after it has broken the necessary bonds to coagulate milk, it for the most part stops splitting bonds. Dr. Sardinas explained that stronger milk-clotting enzymes, like papain and ficin, continue to digest further, which causes "bad flavors and poor curd consistency."

Dr. Cayle also described the milk-coagulating process in depth. He compared the casein protein to a freight train of 170 amino acids or cars, with one particular, susceptible bond or coupling between the cars/amino acids. The couplings between the cars are all the same, but each car or amino acid is itself different. The coupling or peptide bond which is going to be attacked by the milk-clotting enzyme is the same as the others, but what allows for it to be specifically split is the relationship of the different amino acids to one another. The configuration of the phenylalanine and methionine amino acids causes the enzyme to attack the bond between them at the fastest rate, breaking it, and releasing the kappa-casein portion to bind with calcium and create a stable curd. The rennet enzyme probably breaks other bonds in the amino acid chain, but at a much slower rate. Stronger milk-clotting enzymes will attack other bonds at a much faster rate. Rennet, Dr. Cayle explained, "allows for the formation of the curd by breaking that one bond and then sort of holds back and doesn't do any more damage."

Plaintiff's witnesses cited numerous animal sources of rennet, including calves, cows, lambs, kids, and goats. One witness, Dr. Stine, stated experiments are being performed to test chicken gizzards and thistles as sources of rennet. The witnesses also named three microbial sources of rennet. These microbials, identified by their Latin name, include *Mucor miehei*, *Mucor pusillus*, and *Endothia parasitica*. The Rennilase import presently under consideration is produced from the *Mucor miehei* microbial.

Dr. Sardinas testified that no microbial milk-clotting enzyme preparation worthy of sale had been discovered before 1965. Pfizer produced a milk-clotting enzyme from *Endothia parasitica* in 1967. According to Dr. Stine, microbial milk-clotting enzymes are used to produce about

40 percent of the cheese made in this country, while calf rennet is used for making only about 8 to 12 percent of the country's cheese.

The type of microbial milk-clotting enzyme under consideration is exclusively used for cheesemaking. Plaintiff's witnesses agreed that in the cheese industry, when the word "rennet," which Dr. Kosikowski said comes from a German word meaning "run together," is used by itself, it usually refers only to calf rennet. Other rennets are identified by using the name of their source in front of the word rennet, for example, bovine rennet (from adult cows), kid rennet, etc. Rennilase is the plaintiff's trade name for its enzyme preparation made from *Mucor miehei*. According to the plaintiff's witnesses, in the cheese-making industry, Rennilase would also be described as microbial rennet or *Mucor miehei* rennet.

Dr. Cayle testified that in 1972 the Food and Drug Administration permitted the phrase "microbial rennet" to be placed on the label of the milk-clotting enzyme preparation that the Wallerstein Co. developed from *Mucor miehei*. Dr. Stine similarly testified that while he was vice president of regulatory compliance at Kraft Co., the microbial milk-clotting enzymes were simply identified as "rennet" on the ingredient clauses of Kraft products.

In response to plaintiff's case, the defendant presented 2 witnesses and 10 exhibits, including the pretrial deposition of a third witness. Appearing for the defendant were a university professor of dairy science and a representative of a corporation which manufactures and sells enzymes. Defendant's third witness is manager of regulatory compliance at a cheesemaking corporation.

Dr. Carl Anthon Ernstrom has been head of the Department of Nutrition and Food Science at Utah State University since 1971 and before that he was a professor of dairy science and head of the Department of Food Science and Industries. His Ph. D. thesis was entitled "A Study on Rennet and Rennin." He has authored 20 publications on milk-clotting enzymes and has done consulting work dealing with milk-clotting enzymes for Chris Hansen's Laboratory, Inc., the Pfizer Co., and the New Zealand Rennet Co.

Mr. Niel Dinesen is vice president of technical operations at Chris Hansen's Laboratory, Inc., which is a manufacturer and supplier of food ingredients, including milk-clotting enzymes. Mr. Dinesen, who has the Danish equivalent of a master's degree in chemistry and chemical engineering, has been employed by Hansen since 1961, doing both research and management work. He has authored five or six papers on milk clotting, and has been a member of the Ad Hoc Enzyme Technical Committee and its rennet subcommittee.

Dr. John H. Nelson, whose testimony was taken at a deposition prior to the trial, is employed by Kraft, Inc., where his responsibilities

include insuring compliance of Kraft products with food and drug laws. Prior to his employment with Kraft, Dr. Nelson was associated with Dairyland Food Laboratories, Inc., in the areas of research and management for 22 years. His Ph. D. is in dairy and food science, and he has published approximately half a dozen articles on milk-clotting enzymes.

Two of defendant's witnesses disagree with plaintiff's witnesses, and to a certain extent with each other, with regard to the definition of rennet. Both feel that plaintiff's definition of rennet is overbroad. Dr. Ernstrom presented a very restricted definition of rennet, more specific than the definition the defendant itself espouses. According to Dr. Ernstrom, the term "rennet" refers only to the enzyme preparation produced from the fourth stomach of milk-fed ruminant animals. Mr. Dinesen's definition of rennet is the same as that of the defendant, namely, enzyme preparations that come from the fourth stomach of ruminant animals and used for curdling milk to make cheese.

Defendant's third witness, Dr. Nelson, did not give a definition of rennet, nor did he consider the classification either in terms of function or ingredients. This witness did, however, testify that he formerly considered milk-curdling microbial enzymes to be rennet. Further, it appears that this change of opinion was a result of the difficulty Dr. Nelson first encountered in trying to convince the FDA to call these enzyme preparations rennet. In his testimony, this witness refers to the import in question as microbial or fungal rennet. Rather than contribute to be defendant's proof, Dr. Nelson's testimony supports the plaintiff's position.

Defendant's attempt to distinguish the microbial enzymes from animal rennet is not convincing. Microbial rennet, according to defendant, does not perform precisely the same function as animal rennet. In addition there are other nonrennet enzymes which perform the same function.

On the question of function, defendant attempts to draw three distinctions between the microbial enzyme and animal rennet. First, microbial milk-clotting enzymes are used for short-hold cheese and have not been shown to produce long-hold cheese very well. Second, the microbial enzymes do not contain rennin. Third, in curdling milk, the microbials break amino acid bonds differently from those broken by animal rennets.

Plaintiff's witnesses agree that the microbial enzymes do not produce long-hold cheese as successfully as does rennet from calves. However, as refutation of defendant's distinction, Mr. Dinesen, defendant's own witness, admitted that other animal rennets, like kid and lamb rennets, are not usually employed in making long-hold cheese either. Similarly, when asked whether kid or lamb rennet

contained rennin, Mr. Dinesen testified that he did not know, but that he would still consider milk-clotting enzymes from these animals to be rennet. Nor was it established that goat and sheep rennets broke the same bonds as calf rennet did.

Defendant also contends that microbials should not be classified as rennet based upon function since defendant's witnesses testified that pepsin, also referred to as porcine pepsin, performs the same function but is not a rennet. According to defendant and plaintiff's witnesses, McMullen, Sardinas, Cayle, and Stine, pepsin is a digestive enzyme extracted from pigs' stomachs, and though used in curdling milk to make cheese it is generally not considered rennet in the cheese industry.<sup>2</sup>

However, although pepsin is used to curdle milk, it is not used by itself to do so. Rather it is used in combination with a rennet. Dr. Sardinas described pepsin, as it is used in cheese making, as a diluent for rennet. Defendant's witness Dr. Ernststrom testified that he also had succeeded in making cheese from 100 percent pepsin. There was no dispute between the witnesses as to the fact that cheese is seldom commercially made from 100 percent pepsin.

The parties have agreed that item 437.46 is an *eo nomine* provision. In customs jurisprudence the meaning of an *eo nomine* designation is determined as of the date of the statute. However, an *eo nomine* provision is intended to include all articles subsequently created which fairly come within its scope. *Sears, Roebuck and Co. v. United States*, 46 CCPA 79, C.A.D. 701 (1959); *Hoyt, Shepston & Sciaroni, S. Blondheim & Co. v. United States*, 52 CCPA 101, C.A.D. 865 (1965). Additionally, an unqualified provision for an article includes such articles made by artificial means. *Christensen Diamond Products Co. v. United States*, 54 Cust. Ct. 221, C.D. 2537, 243 F. Supp. 212 (1965), *appeal dismissed*, 53 CCPA 155 (1965).

The meaning of a word in a tariff provision is determined by its common usage, unless it is shown to have a different commercial meaning. *United States v. C. J. Tower & Sons*, 48 CCPA 87, C.A.D. 770 (1961). In determining whether an imported article is embraced within an *eo nomine* designation, use may be considered in order to establish its identity. *United States v. Quon Quon Company*, 46 CCPA 70, C.A.D. 699 (1959).

The court may consult dictionaries, lexicons, scientific authorities, and other reliable sources of information as aids to determine the common meaning of tariff terms. *Trans-Atlantic Company v. United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973). Dictionary definitions support the claim that the meaning of rennet encompasses

<sup>2</sup> Plaintiff's witness Dr. Kosikowski did testify that he would classify pepsin as a rennet when it was used as a rennet.

any enzyme which is used for curdling milk to create cheese, regardless of the enzyme's source. "Webster's New International Dictionary of the English Language" (2d ed. 1960), gives the following definition of rennet:

rennet, *n.* [ME., fr. *rennen* to run; cf. AS. *gerinnan* to curdle, coagulate, E. dial. *run* to curdle. See RUN, *v.*] 1. The contents of the stomach of an unweaned calf or other animal, or the lining membrane of the stomach (esp. of the fourth stomach of ruminants), used for curdling milk; hence, also, any preparation of the stomach of animals which is used for that purpose. Rennet rapidly loses its properties when heated above 60° C. Rennet extract is usually prepared from the fourth stomach of calves. 2. Anything used to curdle milk. 3. *Biochem.* Rennin. rennin, *n.* [From rennet.] *Biochem.* An enzyme that coagulates milk. It is found in gastric juice, and also in various lower animals and plants.

Defendant attempted to establish support of its position by legislative history. Defendant's reference to the "Summaries of Trade and Tariff Information" failed to bring to light any support for defendant's interpretation. An excerpt regarding rennet in the most recent summary on this subject strongly supports plaintiff's position. This excerpt is from the 1971 summary, and thus cannot be considered in determining the legislative intent of the provisions being considered. However, the reference is relevant to a determination of the common meaning of the term "rennet" at the time the present import was entered. The relevant portion from the 1971 summary, schedule 4, volume 7, page 64, reads:

Enzymes are obtained by one of three types of processes: (1) Extraction from animal organs removed at slaughter; (2) extraction from vegetable material; and (3) cultivation of selected bacterial or fungal microorganisms. Examples of the first type of process are rennin and pepsin. *Rennin, or rennet, as the enzyme-containing substance is known commercially, is used as a coagulating agent in the manufacturing of cheese and has been obtained historically from the stomach lining of a young calf.* Pepsin, an enzyme used as a digestive aid and food additive, is obtained from the stomach of a hog. Papain, an example of the second type of process, is derived from the papaya fruit and is used as a meat tenderizer. *A second method for producing rennin, utilizing a fungal organism as an enzyme-producing agent, is an example of the third type of process.* \* \* \* [Italic added.]

Plaintiff has satisfactorily established that Rennilase is a form of rennet, microbial rennet, which has recently been developed. Since an *eo nomine* provision encompasses all forms of the named item including those subsequently developed, plaintiff has met its burden of proof in overcoming the classification. The rennet prepared from microbial sources is commonly referred to as rennet. The microbials

perform the same function as is readily recognized as performed by rennet, curdling milk for cheesemaking. The record establishes that microbial milk-clotting enzymes are used solely for making cheese.

Therefore, upon the evidence of record, the claim for classification under TSUS item 437.46 is sustained. Judgment will be entered accordingly.

# Decisions of the United States Customs Court

## *Customs Rules Decision*

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(C.R.D. 79-11)

SCM CORPORATION, PLAINTIFF,

v.

UNITED STATES (BROTHER INTERNATIONAL CORPORATION, PARTY-IN-INTEREST), DEFENDANT.

Court No. 77-4-00553

*Motion for a protective order upon a claim of privilege granted*

### EXECUTIVE PRIVILEGE—DEFINED

The doctrine of executive privilege permits the executive branch to withhold disclosure of intragovernmental documents which contain advisory opinions, recommendations, and deliberations in the formulation of governmental policies and decisions.

### EXECUTIVE PRIVILEGE—PURPOSE

The privilege exists to encourage uninhibited and frank internal discussion in the formulation of governmental policy and decision-making. See *United States v. Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090 (1974).

### EXECUTIVE PRIVILEGE—SCOPE

Except in cases of military or State secrets, executive privilege is not absolute, and the courts must determine whether the facts justify sustaining the claim of privilege. See *United States v. Reynolds*, 345 U.S. 1, 11, 73 S. Ct. 528 (1953). The courts have permitted disclosure of purely factual communications which would not compromise military or State secrets. See *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87-88, 93 S. Ct. 827 (1973). In weighing the conflicting interests to determine whether the documents should be protected from disclosure, a specific need must be demonstrated for the materials sought. Upon this basis, the importance of the materials to the lawsuit is weighed against the governmental policy to protect the confidentiality of executive communications. *United States v. Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090 (1974).



**EXECUTIVE PRIVILEGE—PROCEDURE**

To be properly invoked, the claim of executive privilege must comply with established criteria; the privilege must be formally claimed; it must be asserted by the head of the agency who personally considered the matter; the materials must be reviewed; and an appropriate affidavit must be submitted in support of the claim. See *Sprague Electric Company v. United States (Capar Components Corp., Party in Interest)*, 462 F. Supp. 966, 81 Cust. Ct. 168 (1978).

**EXECUTIVE PRIVILEGE—WAIVER**

A valid objection to the production of the documents made upon a discovery request should not foreclose additional objections in subsequent proceedings.

(Dated June 11, 1979)

*Frederick L. Ihenson* for the plaintiff.

*Barbara Allen Babcock*, Assistant Attorney General (*David M. Cohen*, Branch Director, Federal Programs Branch; *Sheila N. Ziff*, trial attorney), for the defendant.

*Tanaka, Walders & Ritger* (*H. William Tanaka*, *Lawrence R. Walders* and *Wesley K. Caine* of counsel) for the party-in-interest.

RE, Chief Judge: This is an American manufacturer's action brought by SCM Corp. [SCM], a domestic typewriter manufacturer, under the provisions of 19 U.S.C. 1516(c). Plaintiff, SCM, seeks to review the failure of the Secretary of the Treasury to assess dumping duties on certain Japanese typewriters under the terms of the Anti-dumping Act of 1921, as amended.

For dumping duties to be assessed, it is necessary that the Secretary of the Treasury determine that a class or kind of imported merchandise is being, or is likely to be, sold in the United States or elsewhere at less than fair value. In addition, the International Trade Commission must determine that an industry in this country is being, or is likely to be, injured, or is prevented from being established by reason of the importation of such merchandise at less than fair value. It is only when both of these determinations are made in the affirmative, i.e., less than fair value and injury, that dumping duties may be assessed. Thus, if the Secretary finds no sales at less than fair value, or if the International Trade Commission makes a negative injury determination, no dumping finding can be published and no dumping duties can be assessed. 19 U.S.C. 160 et seq. (Antidumping Act).

The history and underlying issues of this litigation are discussed in *SCM Corporation v. United States (Brother International Corporation, Party-in-Interest)*, 450 F. Supp. 1178, 80 Cust. Ct. 226 (1978), in which this court decided that it had jurisdiction to review the negative injury determination of the International Trade Commission.

During the course of the litigation, plaintiff, by interrogatories,

sought from the defendant, among other things, all documents and things in the files of the International Trade Commission and each Commissioner in investigation No. AA1921-145. In response, defendant categorized and identified all of the documents and things that it claimed were in the files of the Commission or Commissioners at the time of the negative injury determination.

Defendant did not produce the documents requested, and plaintiff sought an order compelling discovery. Defendant filed a cross-motion for a protective order, and moved to be relieved from responding to plaintiff's interrogatories and motion to produce.

The court entered an order requiring that the Secretary of the International Trade Commission prepare and transmit to the Clerk of the U.S. Customs Court, the following:

(1) A certified copy of the transcript of proceedings, and all exhibits introduced before the Commission in its investigation numbered AA1921-145;

(2) Certified copies of all written submissions, questionnaires, reports, and other documents which relate to investigation AA1921-145;

(3) All other things in the files of the Commission relating to that investigation.

The order further provided that the denial of defendant's cross-motion for a protective order was without prejudice, and was subject to renewal for the documents or things that were received by the Commission on a confidential basis, or that were otherwise privileged. *SCM Corporation v. United States (Brother International Corporation, Party-in-Interest)*, 81 Cust. Ct. 159, C.R.D. 78-13 (1978).

In compliance with that order, copies of all documents, confidential and nonconfidential, were transmitted to the court. Based upon a claim of executive privilege asserted by Hon. Joseph O. Parker, chairman of the International Trade Commission, the defendant now moves for a protective order as to nine documents. A formal affidavit executed by Chairman Parker was submitted and attached to defendant's brief.

When defendant, in response to plaintiff's discovery request, identified every document and thing in the files, it identified only one of the nine documents now claimed to be privileged, i.e., item No. 44, the "pros and cons" statement. Defendant contends that it has validly asserted privilege not only as to document No. 44, but also as to the other eight documents not previously identified.

The nine disputed documents listed by the defendant are described as follows:

No. 44—An undated 4-page "pros and cons" statement prepared by staff for the use of the Commissioners in arriving at the

Commission's determination with regard to Portable Electric Typewriters from Japan. This statement sets forth suggested criteria to be used as well as possible reasons for and against an affirmative injury determination. The document contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry;

- No. 56—Twelve-page, handwritten draft of Document 44;
- No. 58—An undated 2-page draft opinion entitled "Statement of Reasons for Determination of Commissioner Minchew to Abstain" prepared by staff for the exclusive consideration of, and use by Commissioner Minchew in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations;
- No. 59—An undated 1-page draft opinion entitled "Statement of Reasons for Abstension (sic) of Vice Chairman Minchew" prepared by staff for the exclusive consideration of, and use by, Commissioner Minchew in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations;
- No. 62—Four-page draft opinion, dated June 16, 1975, entitled "Statement of Reasons for Negative Determination of Chairman Leonard, Commissioner Bedell," prepared by staff for the consideration of, and use by, the Commissioners in arriving at their statement of reasons. The document contains staff advice, conclusions, deliberations, opinions, and recommendations;
- No. 63—Three pages of handwritten notes used as a basis for the development of Document 44. Like Documents 44 and 56, this contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry;
- No. 68—An undated, four-page, second draft opinion entitled "Statement of Reasons for Negative Determination of Chairman Leonard and Commissioners Bedell and Parker" prepared by staff for the consideration of, and use by, the Commissioners in arriving at their statement of reasons, with handwritten modification made by, or at the direction, of individual Commissioners. The document contains staff advice, conclusions, deliberations, opinions, and recommendations, as well as tangible evidence of Commissioners' thought processes (in the case of handwritten modifications);
- No. 77—A five-page draft opinion, dated June 17, 1975, entitled "Statement of Reasons for the Affirmative Determination of Commissioner Ablondi" prepared by staff for the exclusive consideration of, and use by, Commissioner Ablondi in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations;
- No. 78—Five-page untitled draft opinion, dated June 16, 1975, that supports an affirmative determination of injury in Portable Electric Typewriters from Japan. This document

was prepared by staff for the exclusive consideration of, and use by, Commissioner Ablondi in arriving at his statement of reasons. This document contains advice, conclusions, deliberations, opinions, and recommendations.

Plaintiff's opposition to the defendant's motion for a protective order is based upon its contention that the claim of executive privilege has been waived by defendant's conduct, and that, in any event, it has not been properly invoked. Plaintiff also maintains that the privilege against interagency advisory opinions is not absolute but qualified.

Plaintiff states that, in response to its discovery request, defendant identified only one of the nine documents now claimed to be privileged, item No. 44, the "pros and cons" statement. At that time, this document was not produced by the defendant on the ground that it was outside the scope of judicial review in these proceedings. Consequently, it is plaintiff's contention that, since the defendant based its refusal to produce item No. 44 solely upon the scope of judicial review, the defendant has waived its claim of privilege.

The plaintiff also contends that, when asked to identify and produce, the defendant's response did not identify the eight additional documents produced after the court entered its order requiring production of all documents and things in the files of the Commission and Commissioners. Plaintiff argues that the defendant has offered no explanation for its failure to produce except that the eight documents were recently located. Also as to these documents, therefore, plaintiff contends that the defendant's conduct is tantamount to a waiver of its claim of executive privilege.

Plaintiff submits an additional reason to deny the defendant's motion for a protective order. It asserts that the claim of executive privilege must be made by the "head" of the department or agency who must personally review the matter to determine whether the privilege should be invoked, and that the chairman of the International Trade Commission is not the appropriate official to invoke the privilege for that agency.

Finally, plaintiff urges that the privilege which attaches to interagency advisory communications does not apply "to purely factual communications within or between agencies, the disclosure of which would not compromise military or state secrets \* \* \*"; further, that if no military or state secrets will be disclosed, even privileged materials should be disclosed "if the need for disclosure outweighs the harm that could result therefrom \* \* \*."

The defendant, in support of its claim of privilege, indicates that it is well established that the government can assert an evidentiary privilege as to documents which contain intragovernmental advice,

opinions and recommendations. The defendant also contends that the failure to pursue a timely valid claim of privilege should not be considered a waiver. Although the defendant states that it erred not to have specifically claimed privilege as to item No. 44, that fact should not prevent the court from granting its motion.

If its claim of executive privilege is not sustained, as alternative relief, the defendant requests a certification by the court that the denial of its motion presents a controlling question of law which justifies an immediate appeal to the Court of Customs and Patent Appeals under 28 U.S.C. 1541(b).

The court must initially examine plaintiff's contention that the defendant has waived the privilege. In addition to denying any waiver, the defendant urges that the public interest in protecting government privileged materials far outweighs the deficiencies in asserting the claim.

As to item No. 44, it is sufficient to note that the defendant initially refused to produce the document on the ground that it was outside the scope of discovery. A valid objection that has been asserted should not foreclose additional grounds for objection in subsequent proceedings. Since executive privilege exists to aid the governmental decisionmaking process, a waiver should not be lightly inferred. Surely, a waiver cannot be implied on the facts before the court.

As for the eight documents not identified upon the discovery request, and now claimed to be privileged, the opportunity to raise the claim of executive privilege should be permitted if it is required by the public interest. In the motion to compel discovery, the defendant has invoked the claim of executive privilege as to all documents. The cases teach that this was a proper method for the invocation of the privilege. See *Armstrong Bros. Tool Co. et al. v. United States (Great Neck Saw Manufacturing, Inc., Party-in-Interest)*, 463 F. Supp. 1316, 82 Cust. Ct. — (1979).

On the question whether the claim has been properly invoked by Chairman Parker, the court notes that it has been held that the Chairman of the International Trade Commission holds a position of high authority, and is authorized to examine documents with the expertise to exercise a proper claim of privilege. *Sprague Electric Company v. United States (Capar Components Corp., Party-in-Interest)*, 462 F. Supp. 966, 81 Cust. Ct. 168 (1978). Quoting from *Smith v. Federal Trade Commission*, 403 F. Supp. 1000, 1016 (D. Del. 1975), which examined the role of the Chairman of the Federal Trade Commission, Judge Newman, in *Sprague* stated:

\* \* \* Chairman Parker is \* \* \* "someone in a position of high authority [who] could examine the materials involved from

a vantage point involving both expertise and an overview-type perspective." Plainly, then, the rationale adopted by the Court in *Smith* concerning the Chairman of the FTC is fully applicable here to the Chairman of the ITC. Within the doctrine of *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), the Chairman of the ITC is clearly the "head" of the Commission for purposes of asserting a claim of executive privilege, and such claim was properly made by him in this case on behalf of the Commission. See also *Kerr v. United States District Court*, 511 F.2d 192, 198 (9th Cir. 1975) (by implication), *aff'd*, 426 U.S. 394 (1976). 462 F. Supp. at 969.

In the action presently before the court, there has been full compliance with the established criteria: The privilege has been formally claimed; it has been asserted by the head of the agency having control over the matter, the Chairman of the International Trade Commission, who personally considered the matter; the materials have been reviewed; and an appropriate affidavit has been submitted in support of the claim of privilege. On the circumstances presented, plaintiff's contention that the claim has not been properly invoked is without merit.

Although it is said that discovery rules apply to the United States "just as fully as they apply to any other person," one of the privileges against discovery, unique to the United States as a sovereign, is that of "executive privilege." See Wright & Miller, "Federal Practice and Procedure: Civil," § 2019 (1970). The doctrine of executive privilege permits the executive branch to withhold disclosure of intragovernmental documents which contain advisory opinions, recommendations and deliberations in the formulation of governmental policies and decisions. *National Courier Association v. Board of Governors of the Federal Reserve System*, 516 F.2d 1229, 1241-42 (D.C. Cir. 1975); *Smith v. Federal Trade Commission*, 403 F. Supp. 1000, 1014 et seq. (D. Del. 1975); and *Verrazzano Trading Corp. v. United States*, 70 Cust. Ct. 347, 350, C.R.D. 73-9 (1973).

The privilege exists to encourage uninhibited and frank internal discussion in the formulation of governmental policy and decision-making. In the words of Mr. Chief Justice Burger, the privilege is necessary because "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances \* \* \* to the detriment of the decision-making process." *United States v. Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090 (1974). See also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504 (1975).

Except in cases of military or state secrets, executive privilege is not absolute, and the courts must determine whether the facts justify sustaining the claim of privilege. See *United States v. Reynolds*, 345



U.S. 1, 11, 73 S. Ct. 528 (1953); Wright & Miller, "Federal Practice and Procedure: Civil" § 2019 (1970). For example, the courts have permitted the disclosure of purely factual communications which would not compromise military or state secrets. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87-88, 93 S. Ct. 827 (1973). Indeed, in all cases the courts must weigh the need for the materials sought against the potential harm that would result from their disclosure. See *United States v. Nixon*, 418 U.S. 683, 711-12, 94 S. Ct. 3090 (1974); *Black v. Sheraton Corporation of America*, 371 F. Supp. 97, 100 (D.D.C. 1974); *Smith v. Federal Trade Commission*, 403 F. Supp. 1000, 1015, (D. Del. 1975).

In weighing the conflicting interests to determine whether the documents should be protected from disclosure, a specific need must be demonstrated for the materials sought. Upon this basis, the importance of the materials to the lawsuit is weighed against the governmental policy to protect the confidentiality of executive communications. *United States v. Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090 (1974). For example, in *Sun Oil Company v. United States*, 514 F. 2d 1020 (Ct. Cl. 1975), the petitioner alleged that its application for an offshore oil platform had been denied by the United States for improper political reasons. The court ordered an in camera inspection of Presidential documents so that it might weigh the conflicting interests between plaintiff's need for the evidence and the Government's requirement of secrecy.

On the other hand, in the *Sprague* case, which dealt with a document similar to item No. 44 in the present case, the court observed:

The draft opinions and "pros and cons" statements sought by plaintiff (documents "a" through "g" in exhibit A) comprise essentially intra-agency advisory opinions and recommendations by the Commission's staff, and were an integral part of the Commission's deliberative process. Thus, these opinions and statements fit squarely within the concept of executive privilege as enunciated in the above-cited cases. In the process of making injury determinations and other decisions within the scope of its authority, it is undoubtedly in the public interest that the Commission and its staff must necessarily feel free to explore various alternatives on a confidential basis. [Footnotes omitted.]

462 F. Supp. at 973.

While documents which contain only factual material may be discovered, it has been observed that:

Free discovery of opinions based on those facts might cause undue reticence by the investigating officer, and prevent fulfillment of the purposes of the investigation. \* \* \*

*Reliable Transfer Co. v. United States*, 53 F.R.D. 24, 25 (E.D.N.Y. 1971).



Although the legal principle is clear, because of the difficulty in some cases in distinguishing between fact and opinion, its application is not always free from doubt. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 86, 93 S. Ct. 827 (1973). In this case, plaintiff has made no request for a severance of any facts from the deliberative or other contents of the documents in issue.

The privilege accorded intragovernmental memoranda reflects the public policy that preliminary discussions and deliberations require confidentiality for a candid consideration of alternative courses of conduct. *Grumman Aircraft Eng. Corp. v. Renegotiation Board*, 482 F. 2d 710, 718 (D.C. Cir. 1973). This aspect of the privilege is analogous to the fifth exemption in the Freedom of Information Act which exempts from disclosure "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552 (b)(5). Indeed, the public interest in fostering candid discussion among governmental personnel may be deemed to take precedence over a litigant's interest in discovering matter essential to presenting a case. See *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958).

In the present case, plaintiff has not demonstrated a clear and persuasive need for the documents in question. In weighing the opposing interests, between the need to produce the documents and the public policy which prevents their disclosure, no compelling reasons have been offered by the plaintiff which would justify producing the "pros and cons" statement as well as the other documents. Plaintiff has not demonstrated what it expects to learn from the disputed materials, nor has it offered sufficient reasons to warrant the production of documents which admittedly contain deliberative matter. *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. at 947-48.

Plaintiff urges that an in camera inspection by the court of the Commission's staff's "pros and cons" statement and draft opinions "may help focus on those facts or documents in the record thought [by the Commission's staff] to be most significant." To follow the suggestion would violate the policy which protects probing the mental processes of public officials who must evaluate the frank expression of opinion of those who must advise and set forth the advantages and disadvantages of a proposed decision. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 92, 93 S. Ct. 827 (1973); *Morgan v. United States*, 304 U.S. 1, 18, 58 S. Ct. 773 (1938). See also discussion in Schwartz, "Administrative Law" 385-92 (1976).

The materials sought, as described in the sworn affidavit and descriptive summary, contain recommendations of two opposite courses of action, viz., on the one hand, a recommendation for an affirmative

injury determination, and, on the other, a recommendation for a negative injury determination. Clearly, these documents, containing opinions, deliberations, advice, and recommendations, show an evaluation by those who must advise on the advantages and disadvantages of a proposed policy decision.

On the question of an in camera inspection, the following statement from the decision of this court in *Armstrong Bros. Tool Co. et al. v. United States (Great Neck Saw Manufacturing Inc., Party-in-Interest)*, 463 F. Supp. 1316, 82 Cust. Ct. — (1979) is pertinent:

In certain cases where courts have utilized the "in camera" procedure for determining claims of executive privilege, "it appeared, before the inspection was ordered, that the claimant was entitled to some amount of discovery," and it was necessary to separate the privileged and unprivileged materials. [Citations omitted.]

463 F. Supp. 1320.

Thus, where the circumstances demonstrate that factual materials are a part of advisory memoranda, and are severable, an in camera inspection may determine which materials should be disclosed. In this case, the Chairman of the International Trade Commission has submitted an affidavit, attached to a description of the materials, which specifically declares that the claimed documents consist of advisory opinions, conclusions, considerations, deliberations, advice, and recommendations prepared by members of the Commission's staff. The accuracy and veracity of the contents of the materials presented are not questioned. From the description of the materials, and the Chairman's affidavit, it does not appear that an in camera inspection is warranted. Hence, the claim of privilege is sustained.

In summary, the Chairman of the International Trade Commission, in claiming privilege and resisting disclosure, by his affidavit and the description of the materials, has demonstrated to the court that the documents in question are advisory, and contain no severable factual information. The documents in question, representing "pure deliberative processes of government," are protected against disclosure. *Weir v. United States*, 508 F. 2d 894 (2d Cir. 1974).

For the foregoing reasons, based upon all of the papers and proceedings had, it is hereby

ORDERED, ADJUDGED, AND DECREED that defendant's motion for a protective order is granted, and that a claim of privilege has been found to have been correctly made for the documents described in the attached exhibit A, and, it is further

ORDERED, ADJUDGED, AND DECREED that the clerk of the court shall seal the documents listed in the attached exhibit A and keep them sealed pending any further order by the court.

In view of the foregoing, the defendant's request to file an immediate appeal pursuant to 28 U.S.C. 1541(b) is moot.

### EXHIBIT A

#### LIST OF DOCUMENTS INVOLVED IN INVESTIGATION AA1921-145 WITH REGARD TO PORTABLE ELECTRIC TYPEWRITERS FROM JAPAN AS TO WHICH PRIVILEGE IS INVOKED

<i>Document:*</i>	<i>Description</i>
44-----	An undated four-page "pros and cons" statement prepared by staff for the use of the Commissioners in arriving at the Commission's determination with regard to Portable Electric Typewriters from Japan. This statement sets forth suggested criteria to be used as well as possible reasons for and against an affirmative injury determination. The document contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry.
56-----	Twelve-page, hand-written draft of Document 44.
58-----	An undated two-page draft opinion entitled "Statement of Reasons for Determination of Commissioner Minchew to Abstain" prepared by staff for the exclusive consideration of, and use by, Commissioner Minchew in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations.
59-----	An undated one-page draft opinion entitled "Statement of Reasons for Abstention (sic) of Vice Chairman Minchew" prepared by staff for the exclusive consideration of, and use by, Commissioner Minchew in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations.
62-----	Four-page draft opinion, dated June 16, 1975, entitled "Statement of Reasons for Negative Determination of Chairman Leonard, Commissioner Bedell," prepared by staff for the consideration of, and use by, the Commissioners in arriving at their statement of reasons. The document contains staff

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\*These numbers correspond to those in the "List of Documents and Things in the Files of the U.S. International Trade Commission which Relate to ITC Investigation No. AA1921-145 (Portable Electric Typewriters from Japan)."

## Document:\*

## Description

- advice, conclusions, deliberations, opinions, and recommendations.
- 63----- Three pages of handwritten notes used as a basis for the development of Document 44. Like Documents 44 and 56, this contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry.
- 68----- An undated, four-page, second draft opinion entitled "Statement of Reasons for Negative Determination of Chairman Leonard and Commissioners Bedell and Parker" prepared by staff for the consideration of, and use by, the Commissioners in arriving at their statement of reasons, with handwritten modification made by, or at the direction, of individual Commissioners. The document contains staff advice, conclusions, deliberations, opinions, and recommendations, as well as tangible evidence of Commissioners' thought processes (in the case of hand-written modifications).
- 77----- A five-page draft opinion, dated June 17, 1975, entitled "Statement of Reasons for the Affirmative Determination of Commissioner Ablondi" prepared by staff for the exclusive consideration of, and use by, Commissioner Ablondi in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations.
- 78----- Five-page untitled draft opinion, dated June 16, 1975, that supports an affirmative determination of injury in portable electric typewriters from Japan. This document was prepared by staff for the exclusive consideration of, and use by, Commissioner Ablondi in arriving at his statement of reasons. This document contains advice, conclusions, deliberations, opinions, and recommendations.

# Decisions of the United States Customs Court

## *Abstracts* *Abstracted Protest Decisions*

DEPARTMENT OF THE TREASURY, June 18, 1979.

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,  
*Commissioner of Customs.*

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED Per or Item No. and Rate	HELD Per or Item No. and Rate	BASIS	PORT OF ENTRY AND MERCHANDISE
P79/82	Maletz, J. June 14, 1979	Creative Playthings, Division of Columbia Broadcasting System, Inc.	75-7-01839, etc.	Item 737.90 17.5%	Item 737.55 10.5%	Creative Playthings, Division of Columbia Broadcasting System, Inc. v. U.S. (C.D. 4754)	New York Toy cloth blocks or toy cloth bricks
P79/83	Maletz, J. June 14, 1979	A. N. Deringer, Inc.	75-7-01879, etc.	Item 608.05 0.3¢ per lb. Item 608.08 9.5% Item 608.10 0.3¢ per lb.	Item 608.02 Duty free	John V. Carr & Sons Inc. v. U.S. (C.D. 2384); U.S. Customs Service ruling letter of 12/22/75	Alexandria Bay Iron powder (MP22 produced by Domtar, Ltd.) covered by ruling letter of 12/22/75

P79/94	Maletz, J. June 14, 1979	Shayne Knitwear, Inc.	75-7-01893	Item 382.58 37.5¢ per lb. + 20% (blouses and pants) Item 382.54 37.5¢ per lb. + 30% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as en- tireties on basis of export value; said value is in- voice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies three piece suits (jackets, blouses and pants); entireties
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Judgment of the United States Customs  
Court in Appealed Case

June 15, 1979

APPEAL 78-17.—Cascade Corp. *v.* United States.—KNUCKLEBOOM  
CRANES—CONSTRUCTED VALUE—EXPORT VALUE.—C.D. 4757  
affirmed February 22, 1979 (C.A.D. 1219).



# International Trade Commission Notices

*Investigations by the U.S. International Trade Commission*

## DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

R. E. CHASEN,  
*Commissioner of Customs.*

In the Matter of CERTAIN INCLINED-FIELD ACCELERATION TUBES AND COMPONENTS THEREOF	} Investigation No. 337- TA-67
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### *Notice of Investigation*

Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on May 17, 1979, and amended on June 1, 1979, under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), on behalf of the High Voltage Engineering Corp., South Bedford Street, Burlington, Mass. 01803, alleging that unfair methods of competition and unfair acts exist in the importation into the United States of certain inclined-field particle acceleration tubes, or in their sale, by reason of the alleged coverage of such acceleration tubes by claims 1-6 of U.S. Letters Patent No. 3,308,323. With regard to all of the named respondents, the alleged unfair acts and unfair methods of competition are the sale and importation of acceleration tubes which allegedly directly infringe claims 1 and 2 of the patents; additionally, the complaint alleges that the solicitation and sale of such acceleration tubes by Dowlsh Developments Ltd. induce and contribute to the direct infringement of claims 3-6 of the patent by domestic purchasers of the articles, also in violation of section 337.

The complaint, as amended, alleges that the effect or tendency of the unfair methods of competition and unfair acts is to substantially

injure an industry, efficiently and economically operated, in the United States. Complainant requests (1) exclusion from entry into the United States, except under bond, of the imports in question during the period of the investigation, (2) permanent exclusion from entry into the United States of the imports in question after a full investigation, and (3) such other relief as is authorized by the statute.

Having considered the complaint, as amended, the Commission, on June 12, 1979, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), an investigation be instituted to determine whether there is, or there is reason to believe that there is, a violation of subsection (a) of this section in the unlawful importation of certain inclined-field particle acceleration tubes and components thereof into the United States, or in their sale, because of the alleged infringement of claims 1-6 of U.S. Letters Patent No. 3,308,323, the effect or tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States;

(2) For the purpose of this investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

High Voltage Engineering Corp.  
South Bedford St.  
Burlington, Mass. 01803

(b) The respondents are the following entities alleged to be involved in the unauthorized importation of such devices into the United States, or in their sale, and are parties upon which the complaint, as amended, shall be served—

Dowlish Developments Ltd.  
Dowlish Ford Mills  
Ilminster  
Somerset, England  
Peabody Scientific  
P.O. Box 2009  
Peabody, Mass. 01980  
Office of the President  
State University of New York at Stony Brook  
Stony Brook, N.Y. 11794

Office of the President  
University of Rochester  
Room 240  
River Station  
Rochester, N.Y. 14627

Chancellor's Office  
University of Pittsburgh  
107 Cathedral of Learning  
Pittsburgh, Pa. 15260

(c) Louis S. Mastriani, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, is hereby named Commission investigative attorney, a party to this investigation; and

(d) For the investigation so instituted, Chief Administrative Law Judge Donald K. Duvall, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, shall designate the presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's Rules of Practice and Procedure (19 CFR 210.21). Pursuant to sections 201.16(d) and 210.21(a) of the rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the amended complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause is shown.

Failure of a respondent to file a timely response to each allegation in the amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the amended complaint and this notice, and to authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the amended complaint and this notice and to enter both a recommended determination and a final determination containing such findings.

The complaint, as amended, is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, and in the Commission's New York City office, 6 World Trade Center, New York, N.Y. 10048.

By order of the Commission.

Issued: June 20, 1979.

KENNETH R. MASON,  
*Secretary.*

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In the Matter of	}	Investigation No. 337-TA-63/65
CERTAIN PRECISION RESISTOR		
CHIPS		

*Notice of Prehearing Conference and Hearing*

Notice is hereby given that a prehearing conference will be held in this case at 9 a.m. on July 23, 1979, in room 610, Bicentennial Building, 600 E Street NW., Washington, D.C. The purpose of this prehearing conference is to review the prehearing statements submitted by the parties, to complete the exchange of exhibits, and to resolve any other necessary matters in preparation for the hearing.

Notice is also given that the hearing in this proceeding will commence at 9 a.m. on July 30, 1979, in room 610, Bicentennial Building, 600 E Street NW., Washington, D.C.

If the Commission designates this case more complicated, the prehearing conference and hearing will be postponed.

The Secretary shall publish this notice in the Federal Register.

Issued: June 18, 1979.

JANET D. SAXON,  
*Administrative Law Judge.*

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## Treatises and related publications:

Schwartz, *Administrative Law* (1976), pp. 385-92, C.R.D. 79-11

Wright & Miller, *Federal Practice and Procedure: Civil* (1970), sec. 2019, C.R.D. 79-11

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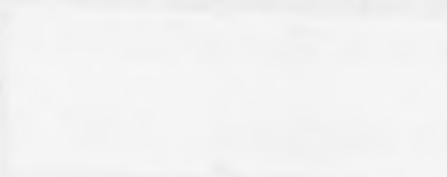
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The following table shows the results of the survey of the  
 distribution of the various species of the genus *Phlox*  
 in the various regions of the country. The numbers in the  
 parentheses indicate the number of specimens examined.  
 The numbers in the brackets indicate the number of  
 specimens which were not examined. The numbers in the  
 italics indicate the number of specimens which were  
 not examined. The numbers in the bold type indicate  
 the number of specimens which were not examined.



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